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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1201

FRANK RAGANO, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, FRANK RAGANO, by and through his undersigned attorneys, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in *United States* v. *Ragano (Ragano I)* is reported at 476 F.2d 410 (5th Cir. 1973), and the opinion of the United States Court of Appeals for

the Fifth Circuit in *United States* v. *Ragano (Ragano II)* is reported at 520 F.2d 1191 (5th Cir. 1975). *Ragano I* is reprinted in App. A, pp. 1a-17a, *infra,* and *Ragano II* is reprinted in App. B, pp. 18a-45a, *infra.*

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit in *Ragano II* was entered on October 14, 1975. It is reprinted in App. C, p. 46a, *infra.* This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I. Whether the Double Jeopardy Clause Precluded Ragano's Retrial Under a Theory and Factual Characterizations Contrary to the Theory and Factual Characterizations Supporting the Conviction from Which He Appealed.

A. Whether Ragano's prior acquittal on original Count I for income tax evasion barred the subsequent prosecution for income tax evasion and for the lesser included offenses of making false declarations in his 1966 and 1968 income tax returns.

B. Whether, by successfully appealing his conviction under Count III of the original indictment, Ragano consented only to be Retried under the particular theory and particular factual characterizations that underlay the appealed-from conviction.

C. Whether the "same transaction" or "same criminal episode" test for double jeopardy barred the government from reprosecuting Ragano under a different legal theory.

II. Whether the Due Process Clause Precluded Ragano's Retrial Under a Theory and Factual Characterizations Contrary to the Theory and Factual Characterizations Supporting the Conviction from Which He Appealed.

III. Whether the District Court Erred in Denying Ragano's Motion for a Directed Judgment of Acquittal.

CONSTITUTIONAL PROVISIONS AND RULE INVOLVED

This case involves the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution which, in pertinent part, provides that no person "shall be subject for the same offense to be twice put in jeopardy of life or limb . . .", the Due Process Clause of the Fifth Amendment to the United States Constitution which, in pertinent part, provides that no person may "be deprived of life, liberty, or property, without due process of law . . . ," and Rule 29(a) of the Federal Rules of Criminal Procedure which, in pertinent part, provides:

> The Court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficint to sustain a conviction of such offense or offenses.

STATEMENT OF THE CASE

A. Background Facts

The Petitioner, FRANK RAGANO, is a prominent, albeit controversial, *cf. Time, Inc.* v. *Ragano,* 427 F.2d 219 (5th Cir. 1970), Florida attorney who, in the past, has engaged primarily in the practice of criminal law. In the present case, the facts are substantially uncontradicted and have been set out, in differing extents, in both Fifth Circuit decisions. For a proper consideration of the issues raised in this Petiton, however, the critical historical facts have been set forth below in the view most favorable to the Government. *See Glasser* v. *United States,* 315 U.S. 60 (1942).

In 1964 or 1965, co-Defendant, S. A. Rizzo, (Rizzo), an acquaintance of Ragano's, sought his assistance in

obtaining a $5,000,000.00 loan from the Teamsters Union Pension Fund. Rizzo wanted the money to buy and to develop a large tract of land north of Miami, land that he could purchase at a very favorable price because he knew the owner, Mr. Ives, and had known him for years. Ragano agreed to assist Rizzo in obtaining financing for the project and, in the course of this assistance, Ragano traveled to Chicago on numerous occasions to discuss the proposed loan with trustees and other officials of the Pension Fund; in all probability, these discussions involved and included James Hoffa, though Ragano did not formally represent Rizzo nor did he appear on Rizzo's behalf at any meeting at which the loan was officially considered.

The loan application was made on Rizzo's behalf on February 9, 1965. A week later, on February 16, 1965, the trustees of the Pension Fund voted to approve the application. On March 9, 1965, a commitment letter was issued. The loan was later consummated by Rizzo's execution of a promissory note and mortgage. The $5,000,000.00 loan allocated its proceeds as $3,500,000.00 for the purchase of the land, $1,000,000.00 for construction and improvements and $500,000.00 for expenses, including commissions on the loan.

On January 29, 1965, articles of incorporation had been issued to Two Seasons, Inc., a Florida corporation, organized for the purpose of acquiring, holding, and developing real estate. On February 9, the date on which the loan application was formally submitted, the traditional dummy incorporators of Two Seasons met for the purpose of electing Rizzo as president of the company and chairman of its Board of Directors. All fifty shares of capital stock in Two Seasons were issued jointly to Rizzo and to his wife, who was also an officer

and director of the company. On June 5, 1965, the property purchased with the loan proceeds was transferred from Rizzo to Two Seasons.

On May 12, 1965, Ragano received $15,000.00 from Two Seasons, charged to its "Acquisition Costs" account. Beginning on November 15, 1965, and continuing through 1967, Ragano received from Two Seasons sums in amounts ranging between $200.00 and $30,000.00. These amounts were treated as loans on the books of the corporation, but they were neither secured nor evidenced by promissory notes and bore no interest. Nor did Ragano list any of these loans as liabilities in his financial statements.[1]

On January 3, 1967, certificates representing 20 shares of Rizzo's stock in Two Seasons, a 40% interest, were cancelled and new certificates in the same amount were issued to Ragano. On the same date, Ragano executed an unsecured, non-interest bearing, demand note in the amount of $40,000.00 payable to the Rizzos. In March, 1967, but as of January 3, 1967, Ragano executed a financial statement in connection with a loan application at the County National Bank of Miami Beach. That statement listed as assets the 20 shares of Two Seasons stock, valued at $2,288,000.00; it did not, however, list as liabilities either the $50,000.00 note to Rizzo or the loans from Two Seasons.

From about the time of Rizzo's loan application, Ragano began to procure a number of loans from the Central Bank of Tampa, where he had been previously

[1] The total of the loans was $90,550.00. However, $30,000.00 of this amount was eventually transferred on the company's books to the "Legal Expense and Land Acquisition Costs" account, leaving a loan balance of $60,550.00 at the end of 1967.

a customer. At the beginning of 1965, he had one loan from this bank with a then outstanding balance of $16,500.00. Between February, 1965, and October, 1967, Ragano obtained eight additional loans in face amounts varying between $2,500.00 and $12,500.00. Interest was paid on each of these nine loans through September, 1967; no payments of principal were made on any of the loans after September, 1965, except for payments on one relatively small loan and three payments totalling $1,755.45 on two of the other eight loans. Sometime in 1967 or 1968, Ragano delivered 10 shares of the Two Seasons stock to the bank for the purpose of redelivery to such person as might be designated at the time the loans should be repaid. As of August, 1968, when all of the loans were paid in full by a check drawn on a savings and loan institution and sent to the bank by Rizzo, the outstanding balance was $51,108.12. The 10 shares were delivered, in accordance with the instructions, to Rizzo's agent.

On November 11, 1966, Ragano borrowed $25,000.00 from the County National Bank of North Miami Beach. This loan was later renewed, and still later combined with a second loan in the amount of $30,000.00 obtained on March 15, 1967. On December 6, 1967, Ragano pledged the remaining 10 shares of Two Seasons stock to secure payment of the combined loans. On January 3, 1968, a third loan of $30,000.00 was granted by the bank, nominally to Assured Home Improvement Co. The loan was guaranteed by Ragano and was secured by the same 10 shares of Two Seasons stock that he had used as security for the original two loans. The loan proceeds were turned over to Ragano. On April 18, 1968, the total balance of $68,364.08 was paid by a check from Two Seasons and the stock was delivered to Rizzo.

The 20 shares of Two Seasons had not been listed in Ragano's name during the full period between their Formal transfer to him in January, 1967, and the date in 1968 when Rizzo retrieved them from the banks. The certificate representing the shares was cancelled on March 24, 1967, and those shares were reissued to Rizzo, making him, once again, the sole record shareholder of Two Seasons. On November 6, 1967, the shares were again reissued to Ragano, this time in the form of two certificates representing 10 shares each; this change made it possible to put up some of the shares as collateral at each of the two banks.

On January 2, 1968, one day before Ragano obtained the last of the bank loans, he and the Rizzos executed a Stockholders Agreement providing that, if any shareholder should pledge his stock as security for indebtedness and that indebtedness came into default, the remaining shareholders would have the right to pay the obligations for which any such shares were pledged and would "become the owner thereof free and clear of any claim of ownership by the other stockholders or stockholder . . . ."

On January 12, 1968, Ragano executed a handwritten codicil to the agreement in which he assigned the 20 shares to Rizzo "in consideration for the said S. A. Rizzo assuming the present indebtedness of the undersigned to the Central National Bank of Tampa, Florida, and the County Bank of North Miami Beach, Florida, and also holding the undersigned harmless and no longer indebted to the said corporation (Two Seasons) for loans made by the said corporation to the undersigned". No mention was made in the codicil of any note or notes executed by Ragano in Rizzo's favor.

The corporate and other indebtedness of Ragano assumed by Rizzo in January, 1968, amounted to a total of one hundred eighty thousand twenty-two dollars and twenty cents ($180,022.20).

B. Ragano I

In *United States* v. *Ragano, (Ragano I)*, 476 F.2d 410 (5th Cir. 1973), Ragano was charged in a three-count indictment with violating the federal income tax criminal penalty statutes. Specifically, Ragano was charged with (i) attempting to evade taxes due and owing for the calendar year 1967, in violation of 26 U.S.C. § 7201,[2] (ii) making a false declaration in his 1967 joint income tax return, in violation of 26 U.S.C. § 7206(1),[3] and (iii) making a false declaration in his 1968 joint income tax return, in violation of 26 U.S.C. § 7206(1).

In this initial prosecution, the Government contended, and argued to the trial court and to the jury, that the stock transfers in question were, indeed, *bona fide* transactions, the tax consequences of which Ragano

[2] 26 U.S.C. § 7201 declares:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

[3] 26 U.S.C. § 7206(1) declares that any person who

> [w]illfully makes and subscribes any return, statement or other document, which contains or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter;
>
> * * * * * * * * * * *
>
> shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

had failed to report correctly. The thrust of the Government's case was that Ragano had in 1967 received the stock as ordinary income as a finder's or brokerage fee, had failed to report it as such in his income tax return for 1967, and had mistreated the proceeds of the sale of the stock in his 1968 income tax return by claiming a capital gain. At no time did the Government contend that the stock transactions were anything other than ordinary, *bona fide* transfers. The sole question was whether Ragano had, with criminal intent, failed to report the stock as ordinary income.

The jury aquitted Ragano on *both* counts relating to 1967, but it convicted him under Count III of making a false declaration in his 1968 joint income tax return, in violation of 26 U.S.C. § 7206(1). On appeal, the Fifth Circuit reversed and remanded "the cause" for a new trial, holding that certain trial errors had deprived him of a fair trial.

Ragano II

The retrial on original Count III was set for July 9, 1973, but, at the request of Ragano, it was reset for the week commencing August 6, 1973. On August 2, 1973, four days before the scheduled retrial, the federal grand jury returned a superseding six-count indictment that charged Ragano with (i) conspiring with one S. A. Rizzo to defraud the United States in the collection of income taxes owed by Ragano for the years 1966 and 1968, in violation of 18 U.S.C. § 371,[4]

[4] 18 U.S.C. § 371 declares:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(ii) attempting to evade taxes due and owing for the calendar year 1966, in violation of 26 U.S.C. § 7201(1), (iii) making a false declaration in his 1966 joint income tax return, in violation of 26 U.S.C. § 7206(1), (iv) attempting to evade taxes due and owing for the calendar year 1968, in violation of 26 U.S.C. § 7201, and (v) making a false declaration in his 1968 joint income tax return, in violation of 26 U.S.C. § 7206(1).

The District Court denied Ragano's motion to dismiss the superseding indictment, but it severed the trial of Co-Defendant S. A. Rizzo. Upon retrial, a jury convicted Ragano on all five counts. Ragano's post-trial motions for a new trial, for a directed judgment of acquittal, and to dismiss the superseding indictment were all denied, and Ragano was sentenced to five years' imprisonment on Counts I, II, and IV, and to three years' imprisonment on Counts III and V, with the sentences on Counts II through V to run concurrent with that on Count I. Execution of the sentence was suspended, and Ragano was placed on three years' probation.

In this subsequent prosecution, the Government abandoned its earlier contention that the stock transactions were *bona fide* and, instead, rehabilitated its prosecution by arguing that Ragano and Rizzo had engaged in a series of *sham* stock transactions, conspiring together to disguise the ordinary income nature of the money in question by these transactions. Yet this second "theory" was nothing new to the Government. As the Government pointed out in its "Memorandum in Response to Defendant Ragano's Motion to Dismiss":

> Undersigned counsel had always been critical of the theory of the case as previously tried, and has expressly disassociated himself from it in the course of the appeal . . . . Upon receiving the assignment, counsel reviewed the entire evidence and consulted with investigators with a view to finding charges that would enable the Government to present the evidence on retrial in the most intelligible manner. A determination was made to seek a new indictment *in substantially the form originally recommended by the Internal Revenue Service* (except for the omission of any charge having to do with offenses committed in the filing of the 1967 return), and authorization was sought from designated officers of the department of justice.

Government Memorandum in Response to Defendant Ragano's Motion to Dismiss at 3-4 (emphasis added). Additionally, in that same Memorandum, the Government also stated: "It is also, it should be observed, *the theory on which the Internal Revenue Service had urged that the case be presented . . . .*" *Id.* at 7.

Thus, the Government's own memorandum makes clear that, at the time of the initial prosecution of Ragano, the Government was fully aware of the "sham transaction" theory and deliberately elected not to prosecute under that theory Rather, the Government put aside that theory and chose to prosecute Ragano under the "bona fide stock transfer" theory. Only after it had failed to convict Ragano on two of the three counts, and had lost its conviction on the third count on appeal, did the Government resurrect its alternative theory, the one that the IRS agents had originally recommended as the basis of prosecution.

Appealing his conviction from this second, "sham transaction" trial, Ragano argued that the retrial under the superseding indictment violated his rights

under the Double Jeopardy Clause that the Government's prior advocacy of the *bona fide* transaction theory entitled him to a directed verdict of acquittal under the *sham* transaction theory, and that certain trial errors were prejudicial. The Fifth Circuit affirmed this conviction. *United States* v. *Ragano,* 520 F.2d 1191 (5th Cir. 1975).

Ragano filed a timely Petition for Rehearing and Suggestion for Rehearing *En Banc,* which was denied, and he now files this his Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit. The Order denying his Petition for Rehearing and Suggestion for Rehearing *En Banc* is reprinted in App. D, p. 47a, *infra.*

REASONS FOR GRANTING THE WRIT

The instant case is unique in several respects, but three points are critical to this Court's analysis:

First, after a full investigation, the Government *elected* in the original three-count indictment to prosecute Ragano in connection with the $180,022.20 on the theory that, although the stock transactions were indeed valid, he had not treated their tax consequences correctly. Hence, it must be assumed that the Government decided that the public interest would best be served, and that its chances of obtaining convictions were best, by proceeding under this theory.

Second, the Government *lost* two of the three counts on which it proceeded, and it was required by the Fifth Circuit, to afford Ragano a new trial on the third count because of multiple trial errors.

Third, instead of retrying Ragano on original Count III which it concededly could have done, the Govern-

ment reindicted him *on a new theory of prosecution that charged that the stock transactions were, in fact, a sham.* Thus, in the superseding indictment the Government made a 180 degree turn in its characterization of the transactions in question. In *Ragano I,* the stock transactions were concededly valid; in *Ragano II,* they were a "sham".

I. The Double Jeopardy Clause Precluded Ragano's Retrial Under a Theory and Factual Characterizations Contrary to the Theory and Factual Characterizations Supporting the Conviction from Which He Appealed.

A. Ragano's Prior Acquittal On Original Count I For Income Tax Evasion Barred The Subsequent Prosecution For Income Tax Evasion And For The Lesser Included Offenses Of Making False Declarations In His 1966 And 1968 Income Tax Returns.

Section 7201, 26 U.S.C. § 7201, declares:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

In Count I of the original indictment, Ragano was charged with violating Section 7201 with respect to the calendar year 1967. The jury found him not guilty. Thus, at the first trial Ragano was acquitted of attempting *in any manner* to evade or defeat *any tax* due and owing on the alleged finder's fee. This "Count" was the sole tax evasion count in the original indictment. In the superseding indictment, Ragano was charged with, and was convicted of, violating Section 7201 in

1966 and 1968. This reindictment and subsequent conviction is barred by the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

The critical legal point to be remembered throughout this discussion is *not* that each taxable year constitutes a separate violation; that rule is so well-settled as to be axiomatic. *See, e.g., United States* v. *Smith,* 335 F.2d 898 (7th Cir. 1964), *cert. denied,* 379 U.S. 989 (1965). Rather, the critical point here is that, in both prosecutions, the Government was prosecuting Ragano for attempting to evade the same tax on the same fee, the same dollars. All that changed was the Government's characterization of the manner of attempted evasion.

In the first prosecution, the Government charged that Ragano attempted to evade the tax on the alleged finder's fee when he received the shares of Two Seasons stock in 1967. In the second prosecution, the Government changed only its theory as to the *manner* by which Ragano allegedly attempted to evade the proper tax on the same alleged finder's fee: again, the Government charged that Ragano had attempted to evade the proper tax on the alleged finder's fee, but it proceeded on the theory that the various loans, fees, and stock transfers were merely sham transactions designed to camouflage the receipt of the alleged finder's fee. Thus, in both prosecutions the Government sought to prove that Ragano had attempted to evade ordinary income tax on the alleged finder's fee: all that changed was the method or manner employed by Ragano in the alleged attempt. But Ragano had already, in the first prosecution, been acquitted of evading tax on this amount "in any manner." That acquittal bars all subsequent prosecutions for any attempt to evade the proper tax on the alleged

finder's fee, and it also precludes prosecution for all lesser included offenses arising out of the alleged attempt.

The law is perfectly clear that, had Ragano been *convicted* under original Count I of attempting to evade this tax in violation of Section 7201, the Government would have been barred from reprosecuting him for attempting to evade the proper tax on the same alleged fee, but accomplished in a different manner. Yet, the Double Jeopardy Clause applies not only to reprosecutions following convictions of the same offense, but also to reprosecutions following acquittals. *See, e.g., Green* v. *United States,* 355 U.S. 184 (1957). Hence, having been acquitted of attempting to evade "in any manner" the proper tax on the alleged finder's fee, Ragano was immunized from further prosecution under Section 7201, regardless of the manner of evasion charged by the Government. Having failed once to establish attempted evasion of tax on particular income, the Government is precluded by the Double Jeopardy Clause from reprosecuting Ragano for attempting to evade the same tax on the same income but in a different manner. Otherwise, with respect to criminal income tax prosecutions under Section 7201, the essential protections of the Double Jeopardy Clause become meaningless.

Beause the 1966 and 1968 convictions under Section 7201 are barred by the prohibitions of the Double Jeopardy Clause, so also are the 1966 and 1968[5] con-

[5] Although, at first blush, the Double Jeopardy bar appears unavailable for the count alleging a violation of Section 7206(1) for the year 1968 (since that is the same statute and same year for which Ragano was convicted and subsequently won a new trial), such is not the case. Again, the critical point to be remembered

victions under Section 7206(1) barred. The law is clear that Section 7206(1) describes a lesser included offense of Section 7201, *see, e.g., United States* v. *Lodwick,* 410 F.2d 1202 (8th Cir.) *cert. denied,* 396 U.S. 841 (1969), and convictions of lesser included tax offenses must be vacated where the defendant has also been convicted of the greater tax offense. *See, e.g., United States* v. *Newman,* 468 F.2d 791 (5th Cir. 1972), *cert. denied,* 411 U.S. 905 (1973); *see also United States* v. *Rosenthal,* 454 F.2d 1252 (2nd Cir.), *cert. denied,* 406 U.S. 931 (1972). Hence, since Ragano's reprosecution under Section 7201 for 1966 and 1968 is barred, so also is his prosecution for those years for an offense included within Section 7201. The conviction under the conspiracy count is also barred because it flows from the Government's new, contrary characterization and theory of Ragano's alleged attempt to evade the proper tax due on the alleged finder's fee, and this contrary characterization of the Government's theory, as the next two subsections of this Petition explain, violated Ragano's Double Jeopardy Clause rights in a slightly different way.

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is that, in *Ragano II*, the Government rehabilitated its prosecution of Ragano by characterizing the stock transfer transactions as a "sham." Thus, in *Ragano I*, the alleged false statement was the cost basis of the Two Seasons, Inc., shares. In *Ragano II*, however, the alleged false statement was Ragano's alleged failure to include in his 1968 tax return a portion of the same alleged finder's fee. But this alleged finder's fee was the same fee for which Ragano had been tried, and acquitted, in *Ragano I*. Accordingly, the Double Jeopardy Clause barred Ragano's retrial for violation of Section 7206(1) for the year 1968 under the Government's subsequent recharacterized theory.

B. By Successfully Appealing His Conviction Under Count III of the Original Indictment, Ragano Consented Only To Be Retried Under the Particular Theory and Particular Factual Characterizations That Underlay the Appealed-From Conviction.

Although the Double Jeopardy Clause declares that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb," the courts have developed a well-recognized exception to that rule: a criminal defendant who successfully appeals his conviction has, in effect, waived his Double Jeopardy defense by winning a new trial. "[A] defendant who appeals and is found entitled to a new trial has waived his right to claim double jeopardy at the second trial." *United States* v. *Stapleton,* 494 F.2d 1269, 1270 (9th Cir. 1974). *See also United States* v. *Tateo,* 377 U.S. 463 (1964); *Forman* v. *United States,* 361 U.S. 416 (1960); *Bryan* v. *United States,* 338 U.S. 552 (1950); *Stroud* v. *United States,* 251 U.S. 15 (1919); *Ball* v. *United States,* 163 U.S. 662 (1896); *Leggroan* v. *Smith,* 498 F.2d 168 (10th Cir. 1974); *United States ex rel. Betts* v. *County Court for LaCrosse County,* 496 F.2d 1156 (7th Cir. 1974); *United States* v. *Smith,* 470 F.2d 1299 (5th Cir. 1973); *Thomas* v. *United States,* 450 F.2d 317 (5th Cir. 1971), *cert. denied,* 409 U.S. 859 (1972); *United States* v. *Panzavecchia,* 446 F.2d 1293 (5th Cir.), *cert. denied,* 404 U.S. 966 (1971); *United States* v. *Jasso,* 442 F.2d 1054 (5th Cir.), *cert. denied,* 404 U.S. 845 (1971); *cf. State of Louisiana ex rel. Francis* v. *Resweber,* 329 U.S. 459 (1947).

Early court decisions held that the effect of the request for, and the winning of, a new trial wiped the slate clean for both defense and prosecution. The

zenith of this view came with this Court's decision in *Trono* v. *United States,* 199 U.S. 521 (1905). There, the defendants had been convicted of assault but had been acquitted of murder in the first degree. On appeal, they were convicted of murder in the second degree.[6] Instead of their original six month sentences, they were sentenced to eight years and fourteen years. Rejecting their plea that the Double Jeopardy Clause prohibited such a reopening of the case, the Supreme Court declared:

> In our opinion the better doctrine is that which does not limit the court or jury, upon a new trial, to a consideration of the question of guilt of the lower offense of which the accused was convicted on the first trial, but that the reversal of the judgment of conviction opens up the whole controversy, and acts upon the original judgment as if it had never been. The accused, by his own action, has obtained a reversal of the whole judgment, and we see no reason why he should not, upon a new trial, be proceeded against as if no trial had previously taken place. We do not agree to the view that the accused has the right to limit his waiver as to jeopardy, when he appeals from a judgment against him. As the judgment stands before he appeals, it is a complete bar to any further prosecution for the offense set forth in the indictment, or of any lesser degree thereof. No power can wrest from him the right to so use that judgment, but if he chooses to appeal from it, and to ask for its reversal, he thereby waives, if successful, his right to avail himself of the former

[6] Under "peculiar local procedures modeled upon pre-existing Spanish practices," *Green* v. *United States,* 355 U.S. 184, 195 (1957), the Philippine Supreme Court was empowered to review both facts and law and to substitute its findings for those of the trial court.

> acquittal of the greater offense, contained in the judgment which he has himself procured to be reversed.

199 U.S. at 533.

The *Trono* view of the sweeping, all-encompassing effect of the appealing defendant's waiver has subsequently been substantially restricted by two major Supreme Court decisions: *Green* v. *United States,* 355 U.S. 184 (1957), and *Ashe* v. *Swenson,* 397 U.S. 436 (1970).

In *Green,* the defendant had been charged with (i) committing arson by maliciously setting fire to a house and (ii) causing the death of an inhabitant of the house. At the first trial, the jury was instructed that, as to the second count, it could find him guilty of either first degree murder or second degree murder. The jury found him guilty of arson and of second degree murder, but it did not find him guilty of murder in the first degree. He was sentenced to one to three years' imprisonment on the arson count and to five to twenty years' imprisonment for murder in the second degree. Green then appealed and won a new trial on the ground that the verdict was not supported by sufficient evidence. On remand, he was retried, convicted of murder in the first degree, and sentenced to death.

The Supreme Court reversed, holding that the Double Jeopardy Clause barred the second prosecution for first degree murder. Rejecting the Government's argument that the "total waiver" theory of *Trono* v. *United States, supra,* controlled, the late Justice Black declared:

> The right not to be placed in jeopardy more than once for the same offense is a vital safeguard in

> our society, one that was dearly won and one that should continue to be highly valued. *If such great constitutional protections are given a narrow, grudging application they are deprived of much of their significance.*

355 U.S. at 198 (emphasis added). Although not explicitly overruling *Trono's* "total waiver" theory, the *Green* decision makes clear that the *Trono* opinion was not to be "extended beyond its peculiar factual setting," 355 U.S. at 197.

In *Ashe* v. *Swenson, supra,* this Court strengthened the safeguards of the Double Jeopardy Clause even further by holding that, as a matter of constitutional necessity, it embodied the doctrine of collateral estoppel. But even more important to the present appeal, this Court there sharply condemned prosecutorial refinement of a case upon retrial.

The defendant in *Ashe* had been accused of robbing six men who were engaged in a poker game. Ashe was first prosecuted for robbing one of the poker game participants, but the jury acquitted him on the ground of insufficient evidence. Six weeks later, Ashe was brought to trial again, this time for robbing another of the poker game participants, and was convicted. The United States Supreme Court granted certiorari and reversed, holding that the first jury's determination that Ashe had not been present at the robbery precluded the second prosecution. The Court, in an opinion by Justice Stewart, held that the Double Jeopardy Clause embodied the rule of collateral estoppel and that, since the issue of Ashe's presence at the robbery had been determined adversely to the prosecution in the first trial, the prosecution was precluded from

a second prosecution that hinged upon that same factual issue.

Noteworthy in the *Ashe* decision is this Court's concluding statement, a statement highly pertinent and relevant to the present case:

> In this case the State in its brief has frankly conceded that following the petitioner's acquittal, it treated the first trial as no more than a dry run for the second prosecution: "No doubt the prosecutor felt the state had a provable case on the first charge and, when he lost, he did what every good attorney would do—he refined his presentation in light of the turn of events at the first trial." But this is precisely what the constitutional guarantee forbids.

397 U.S. at 447 (emphasis added). Although the factual circumstances of *Ashe* are, of course, different from those in the present case, the similarity of the Government's behavior in the present case to that behavior condemned in *Ashe* is striking. Here, the Government admittedly tried Ragano, won only a partial conviction, lost that conviction on appeal, and then completely recharacterized and rehabilitated its case for the second prosecution. Not content with a theory that the Fifth Circuit in *Ragano I* had explicitly held contained sufficient evidence to warrant conviction under original Count III, 476 F.2d at 413, the Government "refined" and rehabilitated its case in light of the events and facts disclosed at the first trial. Nor can *Ashe's* policy be distinguished on the ground that Ragano's conviction here on the original Count III in effect kept open the entire matter for prosecution. The Supreme Court's decision in *Green* v. *United States, supra,* makes clear that the *Trono* view of an unlimited waiver has been rejected.

The Double Jeopardy Clause must be held to preclude the Government from taking an exactly contrary view of the financial transaction or transactions in question, in the present series of prosecutions, after it has heard a defendant's defense to a particular prosecutorial theory. Otherwise, a criminal defendant will necessarily be inhibited from making a full defense at trial for fear that, if he is convicted and then wins a new trial on appeal, the prosecutor will be able to devise a new theory of criminal liability to counteract the already-presented defense. The Double Jeopardy Clause should, therefore, be applied to preclude the retrial of a defendant, after a successful appeal, on any theory and factual characterizations other than those that supported the reversed conviction.

Ragano here, by successfully appealing his conviction under original Count III, waived only his double jeopardy right not to be retried under that particular theory and that particular view of the facts for that particular offense. He did not consent, either explicitly or implicitly, to be retried under a new, rehabilitated prosecutorial theory that entailed an interpretation of the facts contrary to the interpretation put forward by the Government in the first trial.

C. The "Same Transaction" Or "Same Criminal Episode" Test For Double Jeopardy Barred The Government From Reprosecuting Ragano Under A Different Legal Theory.

Instead of reprosecuting Ragano under original Count III, which it certainly had the right to do, the Government dismissed that indictment and charged him with five counts, including a conspiracy count, that enabled it to assert that the various stock transactions

were a sham. The conspiracy count was the critical count in the reprosecution; the alleged conspiracy was one designed to disguise the payment of the alleged finder's fee. Thus, the alleged conspiracy was integral to the Government's new, rehabilitated theory of prosecution.

The "same transaction" test for defining "offense" under the Double Jeopardy Clause bars the Government from prosecuting defendants, such as Ragano, under new and different theories of criminal liability. The "same transaction" test for double jeopardy, as advocated by Justice Brennan in his concurring opinion in *Ashe* v. *Swenson, supra,* would require "the prosecution, except in the most limited circumstances, (footnote omitted), to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode or transaction." 397 U.S. at 453-54. Justices Marshall and Douglas endorsed Justice Brennan's view, but the late Justice Harlan expressly disavowed it. A majority of this Court, to this date, has neither accepted nor rejected it. Nevertheless, in the view of Justice Schaefer of the Illinois Supreme Court, the failure of the majority in *Ashe* to adopt the "same transaction" test can in no way be read as a rejection of that view. The Court decided *Ashe* upon the narrowest possible ground, in accord with sound judicial policy. Schaefer, *Unresolved Issues in the Law of Double Jeopardy: Waller and Ashe,* 58 Cal. L. Rev. 391 (1970).

The "same transaction" test has been approved by both the American Law Institute's Model Penal Code and the American Bar Association's Minimum Standards for Criminal Justice Relating to Joinder and Sev-

erance. Section 1.07(2) of the Model Penal Code provides:

> [A] person shall not be subject to separate trials for multiple offenses based on the same conduct or arising from the same criminal episode, if such offenses are known to the appropriate prosecuting officer at the time of commencement of the first trial.

Model Penal Code § 107(2) (Proposed Official Draft 1962). Similarly, the ABA Minimum Standards require compulsory joinder of related offenses that "are based upon the same conduct or arise from the same criminal episode." ABA Minimum Standards for Criminal Justice, Joinder and Severance 1.1, 1.3 (Approved Draft 1968). *See also* Final Report of the National Commission on the Reform of Federal Criminal Laws: A Proposed New Federal Criminal Code §§ 703-706 (1971). The collective opinions and recommendations of these prestigious legal institutions cannot lightly be ignored.

The "same transaction" test, although long and vigorously advocated by critics of the present system of permissive joinder,[7] is not merely an intellectual figment, untried in the "real world." To the contrary, a number of states presently apply, both statutorily and through case law, the protections accorded by the "same transaction" test. *See* Note, *Twice In Jeopardy,*

[7] *E.g.*, R. Arguile, Criminal Procedure 115-16 (1969) ("Where, therefore, offenses may be joined, they ought to be joined"); G. Bower, the Doctrine of Res Judicata 281 (2d ed. A. Turner 1969) ("[T]he prosecutor is always to combine in one indictment all the charges which he intends to prefer, arising out of one transaction:).

75 Yale L.J. 262, 275ns. 60-62 (1965); Cal. Pen. Code § 654 (West Supp. 1975); Ill. Rev. Stat. c. 38, §§ 3-3, 3-4(b)(1) (1975). Moreover, England has abolished its restrictive view of double jeopardy and has adopted a rule of compulsory joinder of all known criminal offenses in the initial prosecution. *See Connelly* v. *Director of Public Prosecutions,* (1964) A.C. 1254. In the *Connelly* decision, Lord Devlin made it clear that, in addition to curbing the potential for abusive reprosecutions, the House of Lords had another public policy in mind in adopting a rule of compulsory criminal joinder: the courts must conduct their proceedings so as to command the respect and confidence of the public, so it is absolutely necessary that issues of fact that are substantially the same be, whenever practicable, tried by the same tribunal at the same time.

The United States Congress has recently enacted a statutory version of the "same transaction" compulsory joinder rule in the Speedy Trial Act of 1974, P.L. 93-619 (January 3, 1975), 18 U.S.C. § 3161(d). Section 3161(d) provides:

> (d) If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offenses or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.

18 U.S.C. § 3161(d). Accordingly, Section 3161(d) specifically provides, in effect, for a compulsory joinder of all offenses "based on the same conduct or arising from the same criminal episode . . . ."

The "same transaction" test, implemented by the procedural rule of compulsory joinder of all known offenses, has found widespread acceptance in all but the federal courts. Hence, this Court should hold that the Government, on the facts of this case, exceeded the constitutional limitations on its prosecutorial powers when it reindicted and retried Ragano under an entirely new theory based upon substantially the same evidence presented at the first trial, and this Court should not permit the conspiracy count conviction to preclude such a determination. Under the "same transaction" or "same criminal episode" definition of "offense," the Government was barred from reprosecuting Ragano under any charge save Count III of the original indictment.

II. The Due Process Clause Precluded Ragano's Retrial Under a Theory and Factual Characterizations Contrary to the Theory and Factual Characterizations Supporting the Conviction from Which He Appealed.

In retrying Ragano under a prosecutorial theory diametrically opposed to that employed in the first trial, the Government's conduct contravened the Due Process Clause of the Fifth Amendment to the United States Constitution. Such conduct violated Ragano's constitutional right to be prosecuted according to our criminal justice system's norm of "fundamental fairness". *See Blackledge* v. *Perry,* U.S. 94 S.Ct. 2098 (1974). In that decision, this Court made very clear that the Due Process Guarantees prevent prosecutors from "upping the ante" riding on a criminal

defendant's appeal. Here, Ragano sought and won a reversal of his conviction under Count III of the original indictment. Faced with genuine difficulties (but of its own making) with retrying Ragano under Count III, the Government resurrected the trial theory originally recommended by the IRS investigating agents. At no time did the Government attempt to justify why it should have been permitted to reject the theory of the first trial and substitute the originally recommended theory. The Government should not be permitted to argue opposing theories of its case without being required to demonstrate a compelling reason for such a switch, and the Due Process Clause of the Fifth Amendment to the United States Constitution should be read and applied to require the Government to demonstrate such a compelling reason.

III. The District Court Erred in Denying Ragano's Motion for a Directed Judgment of Acquittal.

At both the close of the Government's case and the close of his defense, Ragano timely moved for a directed judgment of acquittal. These motions were denied.

The Government, in its subsequent prosecutions of Ragano, has advanced two different, separate, distinct, and factually inconsistent theories of criminal liability. In *Ragano I,* the Government conceded that Ragano acquired the shares of Two Seasons, Inc., as part of a *bona fide* transaction; the thrust of its theory of criminal liability was that, although the shares were actually acquired by Ragano, the acquisition of the stock should have been treated by Ragano as income in 1967 and, therefore, upon the sale of the stock in 1968, there should have been no gain or loss recorded. In *Ragano II,* however, the Government "reversed its field" and charged that the stock acquisition was a "sham", intended to evade proper taxation on the alleged finder's

fee. Thus, on the same facts, the Government took two diametrically contrary views of the transaction or transactions in question. By first prosecuting Ragano under a theory that conceded the validity of the acquisition of the shares of Two Seasons, Inc., the Government, in effect, conceded for the record that a strong probability existed that a jury could find that the acquisition of the shares was a *bona fide* transaction. Yet, in the second Prosecution, the Government charged that the acquisition of the shares was, in fact, not *bona fide*. Rather, the Government contended that the acquisition was part of a sham transaction. Obviously, as the Government's multiple indictments and prosecutions show, the facts of the present case give rise to at least two equally credible hypotheses, both inconsistent on the factual basis of guilt. To say, as did the Fifth Circuit in rejecting Ragano's contention that he was entitled to a directed verdict of acquittal, that both characterizations lead to hypotheses of guilt, misses the point; here, both characterizations cannot *simultaneously* support hypotheses of guilt.

In light of the Government's admittedly inconsistent treatment of the critical facts involved in Ragano's multiple prosecutions, it is clear that the inconsistency of *Ragano I* with *Ragano II* requires that Ragano's conviction under the indictment in *Ragano II* be reversed and remanded with directions to the District Court to enter a judgment of aquittal. Where the Government takes inconsistent factual and legal positions in subsequent prosecutions of the same criminal defendant, it should not be permitted to argue that, although both theories are inconsistent, nevertheless, both point toward guilt. Such an argument is, in effect, pleading in the alternative, the inescapable result of which is that the Government has conceded from the outset that the stock transactions were, in all probability, valid.

CONCLUSION

This Petition for Certiorari presents several related issues, but underlying each of these issues is the fundamental question of the extent to which the Government may, upon retrial, reopen previously-decided questions. Nowhere in its opinion did the Fifth Circuit confront the inescapable inconsistency and conflict between the Government's initial and subsequent theories of Ragano's criminal liability. By affirming Ragano's conviction, the Fifth Circuit implicitedly sanctioned such prosecutorial tactics. Yet the Fifth Circuit's sole comment was:

> So restricting the prosecution from proceeding upon a new legal theory at retrial would erode severally the gold served by permitting retrial of a criminal defendant after the reversal of a conviction.

520 F.2d 1198.

Nowhere did the Fifth Circuit discuss the propriety, let alone the desirability, of such prosecutorial behavior. Accordingly, the real issues of the present case remains undiscussed and unresolved.

In *Ragano I*, the Government characterized the financial transactions in one way; in *Ragano II*, it advocated a precisely contrary characterization. In *Ragano I*, the Government prosecuted Ragano for attempted tax evasion on the alleged finder's fee and lost; in *Ragano II*, the Government rehabilitated its prosecution by charging Ragano, under a new theory of criminal liability, with attempted tax evasion for two different years. The result, of course, is that Ragano's previous acquittal for tax evasion for the year 1967 has been rendered meaningless; and this result, no matter how the Government may seek to justify it, is forbidden by the

Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

Apart from its "new" rehabilitated theory of criminal liability, the Government also reprosecuted Ragano under a different characterization of the facts. In *Ragano I*, the shares of Two Seasons, Inc., stock were concededly transferred and Ragano was considered a *bona fide* shareholder. In *Ragano II*, however, the Government flip-flopped and contended that the so-called transfer was but a "sham". In so doing, however, the Government has conceded that a jury could just as easily find a *bona fide* transfer as find a "sham". Given these opposite characterizations of the facts by the Government, it should be precluded from contending that either characterization is more likely to be true.

Finally, the Government's retrial of Ragano under this different, inconsistent prosecutorial theory violated his constitutional right to be prosecuted with "fundamental fairness", in contravention of the Due Process Clause of the Fifth Amendment to the United States Constitution.

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

No. 72-2954.

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

FRANK RAGANO, *Defendant-Appellant.*

April 9, 1973.

By a judgment of the United States District Court for the Middle District of Florida, at Tampa, Gerald B. Tjoflat, J., the defendant was convicted of the crime of filing of income tax return which he did not believe was true in every material respect and he appealed. The Court of Appeals, Grooms, District Judge, held, inter alia, that error of court in admitting testimony of revenue agent of an alleged admission by defendant as to another person's testimony before state commission to the effect that defendant had earned stock as a finder's fee and as an attorney's fee although defendant neither tacitly nor expressly admitted the truth of the testimony by the other who was not a witness, was not harmless, where court's instruction anticipated an inculpatory response which did not materialize and was misdirected.

Reversed and remanded.

Thornberry, Circuit Judge, filed a specially concurring opinion.

1. Criminal Law § 1159.2(9), 1154.4(1)

It is not for reviewing court to weigh evidence or determine credibility of witnesses.

2. Criminal Law § 1159.2(5)

Verdict of jury must be sustained if there is substantial evidence, taking view most favorable to the Government, to support it.

3. Criminal Law § 1159.2(7)

Reviewing court in considering sufficiency of evidence does not determine whether it establishes guilt beyond reasonable doubt but only whether the evidence would permit trier of fact to find defendant guilty beyond reasonable doubt.

4. Internal Revenue § 2451

There was sufficient evidence to establish defendant's guilt of violation of statute making it a crime to willfully make and subscribe income tax return which taxpayer does not believe to be true and correct as to every material matter arising out of transaction in which defendant acquired stock in real estate development corporation for which he had arranged a loan for developer. 26 U.S.C.A. (I.R.C. 1954) § 7206(1).

5. Criminal Law § 878(4)

Trial court did not err in denying motion of defendant, found guilty of violating statute making it a crime to willfully file income tax return which taxpayer does not believe to be true and correct, for an acquittal on ground of inconsistency of verdict which found defendant guilty on such charge but acquitted him on counts one and two of the indictment based upon defendant's alleged failure to report the receipt of the value of the stock as income for specific year and for making a false statement as to the same. 26 U.S.C.A. (I.R.C. 1954) § 7206(1).

6. Criminal Law § 407(1)

Where defendant neither tacitly nor expressly admitted testimony of another before state commission, testimony of such other person before commission was not admissible as an implied admission in prosecution of defendant in which such other person was not a witness and was not subject to cross-examination. 26 U.S.C.A. (I.R.C.1954) § 7206(1).

7. Criminal Law § 407(1)

Where witness' total response adds up to a clearcut denial, no theory of implied admission is available to make such evidence admissible as an exception to a hearsay rule.

8. Criminal Law § 662(1)

Confrontation clause of Sixth Amendment is not violated as long as the declarant is testifying as a witness and is subject to full and effective cross-examination. U.S.C.A. Const. Amend. 6.

9. Criminal Law § 1169.5(5)

Error of court in admitting testimony of revenue agent as to an alleged admission by defendant regarding another person's testimony before state commission to the effect that defendant, charged with crime of filing income tax return which he did not believe was true in every material respect, had earned stock as a finder's fee and as an attorney's fee although defendant neither tacitly nor expressly admitted the truth of the testimony by the other who was not a witness in prosecution, was not harmless, where court's instruction anticipated an inculpatory response which did not materialize and was misdirected. 26 U.S.C.A. (I.R.C.1954) § 7206(1).

10. Criminal Law § 470

Mere qualifying of witness as an expert does not necessarily render his every conclusion immune from challenge, and expert should not be allowed to state his conclusions on the whole case.

11. Criminal Law § 419(1)

Generally, testimony of an essentially factual nature should not be predicated on opinions, inferences and conclusions of others.

12. Criminal Law § 470

Trial court committed error in refusing to strike ultimate conclusion testified to by expert witness as to why defendant, charged with crime of filing income tax return which he did not believe to be true in every material respect, should have reported the receipt of stock in 1967 return although answer related primarily to return involved in another count since answer went to the key issue involved in count of which defendant was convicted. 26 U.S.C.A. (I.R.C.1954) § 7206(1).

13. Criminal Law § 1038.1(5)

Court's instruction on presumption of knowledge of law which properly submitted to jury the question of defendant's ignorance of law as that question related to specific intent was not such as to constitute plain error in absence of objection by defendant who was convicted of filing income tax return which he did not believe to be true in every material respect. 26 U.S.C.A. (I.R.C.1954) § 7206 (1); Fed.Rules Crim.Proc. rule 52(b), 18 U.S.C.A.

14. Criminal Law § 822(6)

Taking court's instruction as a whole there was no error in any failure of court to define essential elements comprising the crime of filing an income tax return which taxpayer does not believe to be true in every material respect. 26 U.S.C.A. (I.R.C.1954) § 7206(1).

Michael L. Kinney, St. Petersburg, Fla., John R. Parkhill, Edward M. Waller, Jr., Tampa, Fla., for defendant-appellant.

John L. Briggs, U. S. Atty., Jacksonville, Fla., Claude H. Tison, Jr., Asst. U. S. Atty., Tampa, Fla., for plaintiff-appellee.

Before BELL and THORNBERRY, Circuit Judges, and GROOMS, District Judge.

GROOMS, District Judge:

The appellant was convicted on Count III,, of a three count indictment, of a violation of 26 U.S.C.A. § 7206(1).[1]

Count III related to appellant's 1968 return and charged that on June 16, 1969, appellant knowingly made a false declaration in claim to have sold 20 shares of Two Seasons, Inc. stock for $230,022.20 that he had purchased for $50,000.00, and that the income of $180,022.20 was properly treated as a long term capital gain.

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[1] "Any person who——

(1) *Declaration under penalties of perjury.* — Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter;

• • • • • • • • • •

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution."

In late 1964 and early 1965 appellant assisted S. A. Rizzo in obtaining a $5,000,000.00 loan from the Pension Fund of the Teamster's Union. The loan was to be used to buy and develop 700 acres of land just north of Miami, Florida. The land which had an appraisal value of $9,500,000.00 was purchased for $3,500,000.00. Two Seasons, Inc. was organized by Rizzo for the purpose of acquiring, holding and developing the land. The property purchased, together with the balance of the loan proceeds, was transferred by Rizzo to the corporation.

On January 3, 1967, a certificate representing 20 shares of Rizzo's stock in Two Seasons, Inc., a 40% interest, was transferred to appellant, who on the same date executed a non-interest bearing demand note to Rizzo in the amount of $50,000.00.[2] On March 24, 1967, appellant's stock certificate was cancelled, and reissued to Rizzo, ostensibly for use by Rizzo as collateral. On November 6, 1967, the shares were reissued to appellant, who claimed that during the interim the stock was in effect held in trust for him by Rizzo.

On January 12, 1968, appellant transferred his stock to Rizzo in consideration of the cancellation of the $50,000.00 note of January 3, 1967, and Rizzo's assumption of appellant's indebtedness to the County National Bank of North Miami Beach in the amount of $68,364.08, to the Central Bank of Tampa in the amount of $51,108.12, and to Two Seasons, Inc. in the amount of $60,500.00, a total of $230,022.20.

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[2] Much evidence was taken as to another note of July 16, 1965, executed by appellant to Rizzo in the amount of $50,000.00. Appellant claims that that note evidenced the purchase price of the 20 shares of stock, but that he was unable to borrow money to pay off the note and that Rizzo would not issue the stock; that he was informed that the note had been lost; that Rizzo wished a new note; that he agreed to give a new note if the stock was issued to him; and that the January 3, 1967, note was executed and the stock issued pursuant to that understanding.

Beginning in 1965 and over a period of approximately three years Two Seasons paid fees and expenses and made loans to or on behalf of appellant of $252,332.09. However, no amount was paid on the principal sum of $50,000.00.

The Government's basic charge stems from its claim that the real consideration for the issuance of the twenty shares of Two Seasons stock was not a $50,000.00 debt evidenced by the note but fees earned by appellant in procuring the loan from the Pension Fund.

[1-3] A careful review of the evidence covering more than eleven hundred pages of the transcript, leads us to the definite conclusion that the sufficiency of the evidence as to appellant's guilt was for the jury under the guiding principles so frequently announced. Glasser v. United States, 315 U.S. 60, 80,[3] 62 S.Ct. 457, 469, 86 L.Ed. 680; Gordon v. United States, 438 F.2d 858, 867[4] (5th Cir.).

[4] In reaching this conclusion we could not overlook appellant's testimony at a hearing in June 1968, before the Shevin Committee of the Florida legislature in the course of its investigation into organized crime, in which he testified that the Two Seasons stock was a part of his fee—"a combination of attorney's fees and I am in hope of finder's fees." Nor appellant's deposition of October 7, 1968, taken in connection with a libel suit that he filed against Time, Inc., wherein he deposed that he had achieved ownership of the stock, "partially for legal services and partially as a finder's fee." Nor his second deposi-

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[3] "It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it. United States v. Manton, 2 Cir., 107 F.2d 834, 839."

[4] "'[I]n considering the sufficiency of the evidence who do not determine whether it establishes guilt beyond a reasonable doubt, but only whether the evidence would permit the triers of fact to find the defendants guilty beyond a reasonable doubt.'"

tion on December 26, 1968, in the same case wherein he again deposed to substantially the same statement; nor his testimony in the case as follows:

> "[B]ut the ultimate result was that I gave him $50,000 note for the stock, and that's how I was able to acquire the stock, regardless of how I labeled it.
>
> Q. Regardless of how you labeled it, sir?
>
> A. That's right. If you recall, Mr. Dempsey, I said this time and time again, it is a combination of finder's fee and legal fees. I left that up to my accountant. I left it up to the IRS Agent. But when you come down to it, whether after all that is said and done, I never would have gotten the stock without the $50,000 note."

This answer appears to sum up appellant's construction of the consideration for the stock as well as his qualifications of prior statements.

Likewise, on the issue of wilfulness and intent we have not overlooked appellant's evidence that he laid the whole transaction before the agents preceding the filing of his 1968 return and that he cooperated with them in supplying whatever information that he had in his possession. The fact that appellant bared his breast to the investigating agents and extended his cooperation would not exempt him from prosecution and the penalties of the law, if he, nevertheless, proceeded to do what the law proscribed.

[5] Counts I and II of the indictment were grounded upon appellant's alleged failure to report the receipt of the value of the stock as income for 1967, and in making a false statement as to same, respectively. The jury found appellant not guilty on these counts. He contends that there is such repugnancy and inconsistency between the not guilty verdicts on Counts I and II and the guilty verdict on Count III, that Count III cannot stand. Throughout the

trial appellant took the position that the stock had no value on the date of its acquisition in January 1967; that its enhancement from zero to the sum for which it was sold in 1968 resulted from the development of the property during that period. Under this theory the jury could well have found that there was no value to report for 1967, or, at least, could have held that there was ample doubt about the value. Other assumptions could be, but will not be, indulged as a basis of the jury's verdict on Counts I and II. The court did not err in denying appellant's motion for judgment of acquittal on the ground of inconsistency of verdicts. Dunn v. United States, 284 U.S. 390, 52 S.Ct. 40, 76 L.Ed. 520; United States v. Panzavecchia, 446 F.2d 1293 (5th Cir.).

Appellant insists that there was error to reverse in the action of the court in admitting the testimony of Revenue Agent Greenwald of an alleged admission by appellant as to Rizzo's testimony before the Florida State Beverage Commission to the effect that appellant had earned the stock "as a finder's fee, an attorney's fee." The issue was first presented in the course of the prosecution's opening statement and was represented to the court as being an admission by appellant of Rizzo's testimony. Over objection the court ruled that appellant having responded to the statement, the statement of the agent became "res gestae of admission."

The question was again presented in the course of the direct examination of appellant's accountant, Andretta. The court stated that anything that appellant said in the course of the interview with the agent would constitute "an admission exception to the hearsay rule," and that it was necessary in order to determine the extent of the admission to have not only what appellant said but what was said to appellant. The court further stated that he would instruct the jury that it could not consider the comments made by Rizzo to prove the truth of the assertions of

Rizzo, but that the jury could consider the comments in the context of appellant's response.[5]

When Greenwald took the stand, counsel for appellant reminded the court that he had objected to the conversation in the October 1968 conference as to what Rizzo had testified to when the accountant was called. The court replied by instructing the jury as to the consideration to be given to the conversation, the statement of Rizzo, and the response of appellant,[6] following which Greenwald testified that:

> "A. I told Mr. Ragano that I was aware of testimony that Rizzo had given to the State Beverage Department, wherein Mr. Rizzo had testified that Ragano had received the stock for services rendered. I asked Mr. Ragano whether that was true, whether they were legal fees. Mr. Ragano replied no, it was not for services rendered in that he had bought the stock for $50,000 note. He said the books of Two Seasons would bear this out.

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[5] Counsel for appellant stated that he would object when the time came, in reply to which the court ruled that it was not necessary to object.

[6] "THE COURT: Ladies and Gentlemen of the Jury, in telling you what transpired between himself, Mr. Greenwald, and the defendant in the form of conversation, it is anticipated that Mr. Greenwald is going to relate the conversation, and in relating the conversation he will say some things that Mr. S. A. Rizzo told him in the defendant's absence. In other words, during his conversation with the defendant, he may occasionally say, 'Mr. S. A. Rizzo said such and such to me, and what do you have to say about that,' or words to that effect.

"Now, you may not consider what he relates, the witness relates as having been said by S. A. Rizzo out of the defendant's presence. You may not consider that as going to the truth of the matter of the statement that S. A. Rizzo said, but you may consider the defendant's response to those statements."

> "Q. Did he indicate if he was aware of Mr. Rizzo's testimony?
>
> "A. He said he was aware of it."

Greenwald also testified with respect to a further conference in May 1969, when Mr. Adair, an agent now deceased, was present:

> "A. Mr. Adair pointed out to Mr. Ragano that the statements of Rizzo that the stock had been given to Ragano as a legal fee, and that there was no other consideration.
>
> Ragano said that he did not know why Rizzo had testified this way, but it was not true."

Defendant's witness Whyte was cross-examined as to a telephone conversation between him and Greenwald which related to the witness's awareness that Rizzo had testified before the Beverage Commission that the stock had been given to appellant for services rendered.

In his closing argument the prosecutor put the matter flatly as follows:

> "[A]nd we know from the evidence that Mr. Rizzo testified that the payments of stock which had been made to Mr. Ragano in January of 1967 were payments to Mr. Ragano for legal fees."

[6, 7] Appellant neither tacitly nor expressly admitted the alleged statement by Rizzo. On the contrary he flatly denied the truth of any such statement. Certainly in the face of his denial, appellant's knowledge of Rizzo's testimony can hardly be construed as an admission. Where the witness's total response adds up to a clear-cut denial, even any theory of implied admission is not available. McCormick, Handbook of the Law of Evidence, at 528 (1954 Ed); Com. v. Twombly, 319 Mass. 464, 66 N.E.2d 362, and

People v. Wysocki, 267 Mich. 52, 255 N.W. 160. "A flat denial [is] in no sense an admission." *Twombly, supra.*

[8, 9] The confrontation clause of the Sixth Amendment is not violated as long as "the declarant is testifying as a witness and subject to full and effective cross-examination." California v. Green, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489. But here Rizzo did not testify, and, of course, was not subject to cross-examination. In short the prosecutor succeeded in getting Rizzo's testimony before the jury and in exploiting it in his closing argument without calling Rizzo as a witness. He now seeks to avoid the consequences of his action by a resort to the harmless error rule and the court's instruction that the jury could not consider what Greenwald related as having been said by Rizzo as going to the truth of Rizzo's statement. Successfully getting Rizzo's statement before the jury was not the result of a passing incident but of a persistent and sustained effort. The court's instruction anticipated an inculpatory response by appellant that did not materialize, and was consequently misdirected.

In the recent case of United States v. Johnson, 5 Cir., 439 F.2d 885 (1971), where hearsay testimony was introduced solely to show that customs agents were on the lookout for defendant, and not to show the truth of what the informer said, and where the court accepted the ruling and instructed the jury accordingly, Judge Rives, speaking for this court, said:

> "The government next argues that the statements of the informer at most constituted harmless error under Fed.R.Crim.P. 52(a). Erroneous admission of evidence can often be corrected by appropriate jury instructions. Conner v. United States, 5 Cir. 1963, 322 F.2d 647. But before a constitutional error can be held harmless, the court must believe it harmless beyond a reasonable doubt. Chapman v. California, 1967, 386 U.S. 18, 22-24, 87 S.Ct. 824, 17 L.Ed.2d 705."

In Bruton v. United States, 391 U.S. 123, 137, 88 S.Ct. 1620, 1628, 20 L.Ed.2d 476, the court ruled that it could not "accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination," in the context of a joint trial, where a co-defendant implicated petitioner in a written cofession, but did not take the stand.

In Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed. 2d 923, where it was held that the trial court was in error in admitting the transcript of the testimony of an absent witness taken on a preliminary hearing when the defendant was without counsel, the court stated:

> "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal."

In Krulewitch v. United States, 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed. 790, involving a hearsay statement by a co-conspirator to the complaining witness some six weeks after transportation in violation of the Mann Act, the court stated:

> "It is contended that the statement attributed to the alleged co-conspirator was merely cumulative evidence, that without the statement the case against petitioner was so strong that we should hold the error harmless under 28 U.S.C. (1946 ed.) § 391. In Kotteakos v. United States, 328 U.S. 750 [66 S.Ct. 1239, 90 L.Ed. 1557], we said that error should not be held harmless under the harmless error statute if upon consideration of the record the court is left in grave doubt as to whether the error had substantial influence in bringing about a verdict. . . . We cannot say that the erroneous admission of the hearsay declara-

tion may not have been the weight that tipped the scales against petitioner."

Barton v. United States, 263 F.2d 894 (5th Cir.), was a case involving the admissibility of an unsigned statement of a co-defendant given out of the presence of the defendant, Mitchell, and a motion for a severance. The court in reversing ruled:

> "The sole reliance for Mitchell's protection was the court's instruction to the jury, several times repeated, not to treat the statement as evidence against Mitchell. Considering the substance and terms of Barton's statement, we doubt whether it was at all possible to carry out that instruction. To do so certainly would require twelve minds more perfectly disciplined than those of the average human jurors.
>
> • • • • • • • • • •
>
> "The Government argues that a separate trial for Mitchell would have made no difference in the outcome, because 'Mitchell was bound hand and foot by the most awesome array of evidence imaginable, quite apart from the confession of Barton.' We cannot, however, substitute ourselves for the jury, whose duty it was to pass upon Mitchell's guilt or innocence."

See also, Douglas v. Alabama, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934.

Appellant's "admissions" with respect to the consideration for the stock were not unequivocal but qualified. The jury should have been permitted to consider their weight unburdened by inadmissible hearsay. We conclude there was error and that the evidence of guilt in this case was not so overwhelming as to render the error harmless, as was found by the Supreme Cout in Schneble v. Florida, 405 U.S. 427, 92 S.Ct. 1056, 31 L.Ed.2d 340, and by this

court in Hoover v. Beto, 5 Cir., 467 F.2d 516, under the facts of those cases.

Appellant challenges the action of the court in overruling his motion to strike the answer of witness Brock as to why appellant should have reported the receipt of the stock in his 1967 return. The witness answered: "Because this is the year that he received pay for services rendered in the form of stock."

Though the question and answer related primarily to the 1967 return involved in Count I, the answer went to the key issue involved in Count III—the crux of the Government's charges against appellant in reporting the transaction as a long term capital gain rather than ordinary income.

[10, 11] The Court is not unmindful of the modern trend to abandon the rule allowing experts to express an opinion upon ultimate issues when the opinion is otherwise admissible.[7] The mere qualifying of a witness as an expert, Paschal v. United States, 306 F.2d 398 (5th Cir.), does not necessarily render his every conclusion immune from challenge. Experts "ought not to [be] asked or allowed to state their conclusions on the whole case." United States v. Spaulding, 293 U.S. 498, 506, 55 S.Ct. 273, 277, 79 L.Ed. 617. "It is generally agreed that testimony of an essentially factual nature should not be predicated on the opinions, inferences and conclusions of others." *Paschal, supra.*

The Sixth Circuit in Kentucky Trust Co. v. Glenn, 6 Cir., 217 F.2d 462, had for consideration the claim that certain trusts had been created in contemplation of death. The question and the answer by the agent of the Internal Revenue Service were as follows:

> " 'Upon what facts or circumstances, did you base your determination that the Trust estates were part of

[7] See proposed New Federal Rules of Evidence, Rule 704 and note thereunder.

> Mr. Schmidt's estate?' The answer was: 'Well, my determination was made by the fact that the Will, the Trust instruments and the life insurance policy assignments were all made at practically the same time."

The court, in ruling that the trial court erred in overruling the objection, stated:

> "The testimony of the government witness as to why he made the determination to the effect that the trusts in question were made in contemplation of death invaded the province of the jury and permitted the witness to express his opinion as to the ultimate fact. The witness should not have been permitted to testify, in effect, why he believed the deceased made the trusts in contemplation of death. The testimony was incompetent and prejudicial."

[12] The court erred in overruling appellant's motion to strike.

[13] The court's instruction on presumption of the knowledge of the law [8] was not such as to constitute plain error under Rule 52(b), Fed.R.Crim.P. There was no objection to the charge. The first part of the instruction is identical to the charge before the court in Edwards v. United States, 334 F.2d 360 (5th Cir.), Note 3, and held to be not such plain error as to require a reversal. The last sentence properly submitted to the jury the question of appellant's ignorance of the law as that question related

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[8] "It is not necessary for the prosecution to prove that the defendant knew that a particular act or failure to act is a violation of law. Unless and until outweighed by evidence in the case to the contrary, the presumption is that every person knows what the law forbids, and what the law requires to be done. However, evidence that the accused acted or failed to act because of ignorance of the law, is to be considered by the Jury in determining whether or not the accused acted or failed to act with specific intent, as charged."

to specific intent. The court's action finds support in Wardlaw v. United States, 5 Cir., 203 F.2d 884, where it was held that whether the defendant acted under a bona fide misconception of income tax law in failing to report income was for the jury on the issue of knowledge and willfulness.

[14] Taking the court's instruction as a whole, we likewise find no error in any failure of the court to define the essential elements comprising the offense charged in Count III.

Appellant claims that he was denied a fair trial because of the cumulative effect of a series of prejudicial and unfair tactics by counsel for the Government. We have carefully considered these claims, and must frankly state that in certain particulars counsel went to the outer limits of legality. However, in those particulars the court was prompt and firm in its efforts to eradicate any resulting prejudice; and in view of such efforts we are reluctant to and will not hold that it did not succeed in doing so.

Although the court's action in overruling the objections to the admission in evidence of the income tax returns of Rizzo and Two Seasons, Inc., was not challenged on this appeal, we, however, in the interest of trial economy deem it

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APPENDIX B

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

No. 74-2376.

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

FRANK RAGANO, *Defendant-Appellant.*

Oct. 14, 1975.

Following a remand by the United States Court of Appeals, 476 F.2d 410, the United States District Court for the Middle District of Florida, at Tampa, Ben Krentzman, J., entered a judgment finding defendant guilty on five counts of income tax charges including charge of conspiracy, and he appealed. The Court of Appeals, Simpson, Circuit Judge, held inter alia, that following the defendant's successful appeal of his conviction for false swearing to income tax return, Government was not precluded by collateral estoppel or double jeopardy from trying the defendant on the false swearing charge on a wholly new theory, that corporate reports were properly admitted under the Business Records Act, that corporate tax returns were properly admitted for limited purpose, that court properly refused to allow admission of letter from person not a witness and that evidence was sufficient to sustain conviction.

Affirmed.

1. Criminal Law § 193

Where defendant by successful appeal secures reversal of a conviction, a retrial for the same events does not put him twice in jeopardy. U.S.C.A.Const.Amend. 5.

2. Judgment § 713(1)

Doctrine of "collateral estoppel" means simply that when an issue of ultimate fact has been once determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.

See publication Words and Phrases for other judicial constructions and definitions.

3. Judgment § 751

Where Government prosecuted taxpayer for false swearing on tax return on theory that although taxpayer's sale of stock was a valid long-term capital gain transaction, original receipt of stock by taxpayer was income which should have been reported on his earlier return as income and taxpayer successfully appealed his conviction, Government was not precluded by collateral estoppel from retrying taxpayer on same charge of false swearing on new theory that the stock transaction was a sham to disguise payments to taxpayer in the form of loans and that the loans were income to taxpayer on which income taxes were due and owing. 26 U.S.C.A. (I.R.C.1954) § 7206(1); U.S. C.A.Const. Amend. 5.

4. Criminal Law § 1177

Under concurrent sentence doctrine, if conviction is sustained as to conviction under count 1 of the counts as to which concurrent sentences were imposed it is unnecessary to determine legality of conviction under the remaining counts.

5. Conspiracy § 28(2)

Conspiracy is not the commission of crime which it contemplates and neither violates nor arises under statute whose violation is its object.

6. Conspiracy § 28(2)

Commission of substantive offense and entering a conspiracy to commit that offense are separate and distinct and ordinarily a person may be convicted or sentenced for both.

7. Criminal Law § 1192

Where defendant taxpayer was successful in obtaining reversal of conviction on count of complaint charging the making of a false declaration in tax return, upon retrial the Government was not precluded from adding to the indictment a count, not contained in the original indictment, charging conspiracy to defraud Government in the collection of revenue.

8. Criminal Law § 419(1), 436

Corporate reports filed with various departments of state of Florida purporting to list all directors, officers, and, in one instance, shareholders of corporation during period taxpayer purportedly owned stock satisfied requirements of Federal Business Records Act, qualified as exceptions to hearsay rule and were admissible in prosecution of taxpayer since motive to assure accuracy was fulfilled by fact that each was required by state to be filed as a condition of corporate existence and loss of corporate privilege could result from failure to file or by filing intentionally false documents. 28 U.S.C.A. § 1732(a); West's F.S.A. §§ 608.04, 608.041, 608.351.

9. Criminal Law § 436

To be admissible under the Business Records Act, records must be kept pursuant to some routine procedure designed to assure their accuracy, they must be created for motives that would tend to assure accuracy and they must not themselves be mere accumulations of hearsay or uninformed opinion. 28 U.S.C.A. § 1732(a).

10. Criminal Law § 444

Failure of Government to lay a foundation in form of testimony by employee of corporation as to procedures used in preparing and filing corporate documents was not fatal to their admission under the Business Records Act in taxpayer's prosecution for income tax violation, in light of stipulation as to their authenticity and fact that they were filed and prepared in the regular course of business. 28 U.S.C.A. § 1732(a).

11. Criminal Law § 436

Taxpayer's testimony as to his strained relations with corporate officer affected only the weight to be accorded to the corporate documents, admitted under the Business Records Act in income tax prosecution to show that transfer of stock to taxpayer and his sale thereof was a sham, and not their admissibility. 28 U.S.C.A. § 1732(a).

12. Criminal Law § 1169.2(7)

Since corporate records, admitted under the Business Records Act in prosecution of taxpayer for purpose of showing that stock transfers between corporation and taxpayer was a sham, were similar in form and tenor to documents which were already in evidence and which also failed to list taxpayer as either an officer or director, and both an employee of corporation and an officer testified that in the realm of their duties they had never any knowledge of taxpayer having authority of an officer or director of corporation, documents were merely cumulative of other evidence that taxpayer was not an officer or director and any error in their admission was harmless. 26 U.S.C.A. (I.R.C.1954) § 7206(1).

13. Criminal Law § 486

Admission in prosecution of individual taxpayer, involved in corporate stock transaction of corporate tax re-

turns for limited purpose of use by government expert witnesses in arriving at valuation of corporation's stock was not error, and furthermore did not prejudice case of defendant taxpayer whose loan application valued stock greatly in excess of value placed thereon by government testimony. 26 U.S.C.A. (I.R.C.1954) § 7206(1).

14. Criminal Law § 433

Where taxpayer's counsel in prosecution for false swearing on income tax return involving corporate stock transaction was permitted on cross-examination of taxpayer's accountant to use letter from corporate accountant to taxpayer's accountant to the full extent requested and subsequently taxpayer's attorney declined to call corporate accountant as a witness trial judge did not err in refusing to permit contents of letter to be published through taxpayer's accountant, since letter embodied the opinion of corporate accountant as to tax consequences of stock transactions.

15. Criminal Law § 1159.2(1)

Proper standard for review to be applied irrespectively of whether evidence is direct or circumstantial is whether reasonable minds could conclude that evidence was inconsistent with accused's innocence.

16. Internal Revenue § 2451.6

Evidence at second trial was sufficient to establish taxpayer's guilt of false swearing to income tax return notwithstanding fact that Government's theory in first trial resulting in conviction, which was reversed on appeal, was that although defendant acquired corporate stock in valid transaction he treated tax consequences incorrectly while at second trial Government proceeded on new theory that stock transactions were a sham to mask the payment of a finder's fee to taxpayer. 26 U.S.C. (I.R.C.1954) § 7206(1).

E. David Rosen, Miami, Fla., Michael L. Kinney, Thomas T. Steele, Tampa, Fla., for defendant-appellant.

John L. Briggs, U. S. Atty., Jacksonville, Fla., Claude Tison, Jr., Asst. U. S. Atty., Tampa, Fla., for plaintiff-appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before WISDOM, SIMPSON and ROXEY, Circuit Judges.

SIMPSON, Circuit Judge:

This appeal requires us to review for the second time the conviction upon income tax related charges of Frank Ragano, a Florida attorney. See *United States* v. *Ragano*, 5 Cir. 1973, 476 F.2d 410. A description of the prior proceedings before the district court and on appeal is essential to an understanding of the issues raised by the present appeal.

The appellant was charged in a three count indictment returned July 14, 1971, with tax evasion and false swearing. Count 1 charged him with tax evasion in his 1967 tax return in failing to report taxable income of $180,022.20, in violation of Title 26, U.S.C., Section 7201.[1] Count 2 charged appellant with knowingly making a false declaration of income, under penalty of perjury, in his 1967 tax return, in that he knowingly received substantial income in excess of that reported, in violation of Title 26, U.S.C.,

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[1] § 7201. Attempt to evade or defeat tax

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000 or imprisoned not more than 5 years, or both, together with the costs of prosecution.

Section 7206(1).[2] Count 3, related to Ragano's tax return for the calendar year 1968 and charged that he knowingly made a false declaration that he had sold for $230,022.20 certain shares of stock in Two Seasons, Inc., obtained by him in consideration for a $50,000 promissory note, and in the resulting claim that the income of $180,022.20 was properly treatable as long term capital gain, in violation of Title 28, U.S.C., Section 7206(1). At the trial on these counts the government contended that the receipt by appellant in 1967 of certain shares of stock should have been reported as taxable ordinary income in that year. The appellant maintained that he had purchased the shares in 1967 when he executed the promissory note and that the retransfer of the shares to the original seller was a legitimate capital gain transaction. The jury returned a verdict of not guilty as to Counts 1 and 2 and guilty under Count 3. Appellant appealed his conviction and sentence under Count 3 and this court reversed and remanded. *United States* v. *Ragano,* supra.

In the prior appeal the reversal rested on two evidentiary matters. First, we held that the trial court erred in allowing a tax expert for the prosecution to testify that receipt of the shares of stock by appellant was payment for services. We held additionally that appellant's Sixth Amendment right of confrontation was infringed by the admission into evidence over objection of testimony that S. A. Rizzo, from whom the stock was obtained, had testified in an unrelated proceeding, to the effect that the

[2] § 7206. Fraud and false statements

Any person who—

(1) Declaration under penalties of perjury. — Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or . . . .

stock had been given to Ragano for services rendered. *United States* v. *Ragano,* supra, 476 F.2d at 415.

Prior to the scheduled date of retrial on the original Count 3, a superseding six count indictment was returned against appellant. Count 1 charged appellant and Rizzo[3] under Title 18, U.S.C. § 371, with conspiracy to defraud the United States in the collection of revenue, by agreeing to disguise the payment of a "finder's fee" to appellant as a stock transaction on which he would claim a long term capital gain. Counts 2 and 3 charged appellant with tax evasion and false swearing in his tax return for the calendar year 1966 for failure to report $29,556.22 of income, in violation of Sections 7201 and 7206(1). Counts 4 and 5 chaged Ragano with tax evasion and false swearing in his tax return for the calendar year 1968 by failing to report income of $33,645.44, in violation of Sections 7201 and 7206(1). Count 6 charged Rizzo with a 7206(1) offense, respecting his 1969 return's treatment of the Two Seasons stock delivered to Ragano. Count 6 was severed prior to trial and later dismissed. Note 3, supra. Appellant moved to dismiss the indictment on grounds of former jeopardy and collateral estoppel.[4] The district court denied appellant's motion, finding that the offenses charged in the superseding indictment were not identical to those in Counts 1 and 2 of the original indictment, and that no issue of fact as to any count of the superseding indictment could be said to have been resolved in appellant's favor at the first trial. A jury found appellant guilty of all five counts, and he was sentenced to five years imprisonment on each of Counts 1, 2, and 4, and to three years imprison-

[3] Rizzo's motion to sever the charges against him was granted prior to trial. Subsequently, Rizzo's motion to dismiss the indictment as to him as granted, for reasons unrelated to this appeal.

[4] Appellant first moved for dismissal of Count 5 on the ground that he was denied a speedy trial. Subsequently, he enlarged his collateral estoppel contention to include Count 5.

ment on each of Counts 3 and 5. All sentences were directed to be served concurrently, execution of the sentences was suspended, and appellant was placed on three years probation.[5]

The Underlying Facts

The facts involve a complicated series of transactions. We delineate them in the view most favorable to the government. *Glasser* v. *United States*, 1942, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680, 704. In 1964 or 1965 Salvatore A. Rizzo, also known as Sam Rizzo, approached Ragano to seek his assistance in obtaining a five million dollar loan from the Southeast and Southwest Areas Pension Fund of the International Brotherhood of Teamsters (Pension Fund). Appellant agreed to assist Rizzo, and traveled to Chicago on several occasions to discuss the proposal with trustees of the Pension Fund. He did not, however, formally represent Rizzo at the Pension Fund meetings at which the loan was discussed. For his assistance in obtaining loans of this type, appellant would in common practice be entitled to a "finder's fee" of 5% of the loan proceeds from the recipient of the loan.[6] The Rizzo loan application was submitted to the Pension Fund on February 9, 1965, and approved on March 3. On January 29 of that year articles of incorporation were approved for Two Seasons, Inc., a Florida corporation, organized for the purpose of acquiring and developing real estate. On the same date that

[5] The government stipulated prior to trial that the second trial would constitute a retrial for sentencing purposes within the meaning of *North Carolina* v. *Pearce*, 1969, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656. Thus, if convicted appellant would not be sentenced to a term more severe than had been imposed under Count 3 of the original indictment.

[6] In sworn testimony before a Florida legislative committee appellant testified that a "finder's fee" of 5 to 10% was normal for the services of an individual for obtaining loans of this kind. On at least two other occasions appellants received similar fees.

the loan application was submitted to the Pension Fund the first meeting of Two Seasons was held. Rizzo was elected chairman of the Board and President. All fifty shares of stock in the company were issued jointly to Rizzo and his wife.

Appellant received a check for $15,000 from Two Seasons on May 11, 1965, which was charged on the company's books to the "Acquisition Costs" account. A second payment of $10,000 on September 22, 1965 to appellant was charged as a legal expense on the company's books. From November 15, 1965 through 1967 appellant received amounts ranging up to $30,000 from Two Seasons which were recorded on the company's books as loans. These loans, however, were neither secured by promissory notes nor was interest provided for or paid on them. By the end of 1967 these loans under the government's calculations totaled approximately $90,550, of which $30,000 was transferred during the year on the company's books to the "Legal Expense and Land Acquisition Costs" account, leaving a loan balance of $60,550.

During this same period of time Ragano began borrowing funds from two banks. In November 1966 and March 1967 he borrowed $25,000 and $30,000, respectively, from the County National Bank of North Miami Beach. At the beginning of 1965 Ragano owed a balance of $16,500 to the Central Bank of Tampa on an existing loan. Between February 1965 and October 1967, eight additional loans were obtained by him from that bank in amounts ranging between $2,500 and $12,500. Although, interest was paid through September 1967, no principal payments were made on any of these loans after September 1967, except for payments on an installment loan and three payments totaling $1,755.45 on two others. The outstanding balance on these loans as of September 1967 was $43,000. During that same month an employee of Two Seasons, Sheldon Kay, was requested by Rizzo to obtain a $10,000

loan from the County National Bank, which Rizzo would guarantee, the proceeds to be paid to appellant.

On January 3, 1967, Rizzo transferred 20 shares (40%) of Two Seasons stock to Ragano in exchange for appellant's execution of an unsecured, non-interest bearing, demand note in the amount of $50,000. No principal or interest payments were made on this note prior to its cancellation by Rizzo in 1968. At the second trial the government introduced expert testimony showing that the fair market value of the shares on the date of transfer to appellant was $400,000 to $600,000.[7] On the same day that this transaction occurred, appellant was elected vice president of the company and named to the three member board of directors.

The certificate representing the twenty shares held by appellant was retransferred to Rizzo on March 24, 1967, and on November 6, 1967 two certificates of ten shares each were issued to appellant. In March 1967, but as of January 3, 1967, appellant in connection with a loan application filed with the County National Bank listed his assets to include the twenty shares of Two Seasons stock valued at $2,288,000. However, neither the $50,000 demand note held by the Rizzos nor any of the loans on the Two Seasons books were listed among his liabilities.

In December 1967, appellant delivered ten shares of the Two Seasons stock to the County National Bank as security for his outstanding loans. The bank was instructed by appellant to deliver the stock certificate to the person designated at the time the loans were repaid. On approximately January 2, 1968, appellant went to the County National Bank and introduced Louis Galliano to the bank officers. Mr. Galliano procured a loan from the bank nominally in the name of Assured Home Improvement Co., which was

[7] Appellant in a loan application listing his assets and liabilities as of January 3, 1967 valued the 20 shares at $2,288,000.

secured by the same ten shares of stock which the bank already held as security for the loans of appellant. The $30,000 proceeds of this loan were delivered to appellant who used $10,000 of this amount to retire the loan taken out by Sheldon Kay the previous September. At the conclusion of this transaction Frank Ragano had received payments of approximately $250,000, 5% of $5,000,000, from Two Seasons and the various bank loans.

Appellant and Rizzo on January 2, 1968, executed a shareholders' agreement providing that if either stockholder pledged his stock as security for indebtedness and that indebtedness came into default, the remaining stockholder would have the right to pay the obligations, to redeem the stock pledged, and assume full ownership of it. By a handwritten codicil (so labeled) to this agreement dated January 12, 1968, the appellant assigned the 20 shares to Rizzo "in consideration for the said S. A. Rizzo assuming the present indebtedness of the undersigned to the Central National Bank of Tampa, Florida, and the County Bank of North Miami Beach, Florida, and also holding the undersigned harmless and no longer indebted to the said corporation [Two Seasons] for loans made by the said corporation to the undersigned." The codicil did not mention the January 1967 promissory note given by Ragano to the Rizzos, although it was apparently canceled by this transfer.

Subsequently, on April 18, 1968, Rizzo paid the $68,000 balance on all of the County National Bank loan accounts and received the ten shares appellant had pledged as security. The certificate for the other ten shares remained in appellant's possession until mid-August 1968, when he delivered it to the Central Bank of Tampa, with instructions to deliver it to the person paying off his loan balances at that bank. On August 20, 1968, Rizzo sent an employee of Two Seasons to that bank with a check in the amount of $51,108.12 to pay the full balance on appellant's

nine accounts and to take possession of the stock certificate. Subsequently, the two ten-share stock certificates were canceled and a replacement certificate was issued to Rizzo. In September 1968 Rizzo caused the loan balances on the books of Two Seasons in appellant's name to be transferred as loan receivables from him.

Double Jeopardy

On this appeal Ragano bases his primary challenge to his conviction upon the protections of the double jeopardy clause of the Fifth Amendment to the Constitution.

First, he contends that by appealing his conviction for false swearing in his 1968 tax return (Count 3 of the original indictment and Count 5 of the subsequent indictment) he consented to be retried only under the particular theory and factual characterizations urged by the the government at the first trial. The record of the first trial indicates that the government prosecuted appellant on the theory that although the sale of the stock to Rizzo in 1968 was a valid long term capital gain transaction, the original receipt of the stock by appellant was income in that it was transferred to him in lieu of a "finder's fee." Therefore, it should have been reported by him as income in his 1967 tax return. Prior to the retrial on Count 3, of the original indictment, the government in re-evaluating the evidence [8] in light of the jury's verdict and the trial judge's [9] com-

[8] The government concedes on this appeal that the theory on which it based the subsequent indictment was considered and rejected by the government prosecutors *prior to the original indictment.*

[9] The trial judge at the first trial in a conference with the attorneys noted that the jury might reject the government's characterization of the case, as well as the defendant's defense:

> "The Court: But that [the value of the shares received by appellant] is for the jury to determine. Let me say this other thing too. The jury can conclude that he is going to get 5 percent fee on the loan, and that the stock was just a vehicle to try to get capital gain treatment with it because when he did sell it, it was worth far more than—whatever it was he got for it, if he really owned it.
>
> I think that they can draw those inferences.
>
> • • • • • • • • • •
>
> The jury can infer from the fact that this fellow sold him stock for nothing, and the way they handled the certificate, that is just a charade, the stock was . . . ."

ments at the first trial decided to seek a subsequent indictment, based on a different theory than urged by the government at the first trial. Thus, at the retrial the government attorneys characterized the stock transaction as a sham used to disguise the payment to appellant of a "finder's fee" in the form of loans, and that those loans were income to the appellant and on which income taxes were due and owing. Appellant contends that this shift on the part of the government in its presentation of its case was improper, and precluded by the double jeopardy clause, both as to the retrial on the original Count 3 conviction and on the additional counts alleged in the subsequent indictment.

[1] Appellant's argument as to the retrial on Count 3 of the original indictment (Count 5 of the subsequent indictment) entirely overlooks the right of the government to retry a defendant for the same offense after the reversal of a prior conviction. It is a hornbook principle that when a defendant by a successful appeal secures a reversal of a criminal conviction, a later retrial for the same offense does not twice put him in jeopardy. *United States* v. *Jorn,* 1971 400 U.S. 470, 484, 91 S.Ct. 547, 27 L.Ed.2d 543; *United States* v. *Ewell,* 1966, 383 U.S. 116, 124-25, 86 S.Ct. 773, 778-79, 15 L.Ed.2d 627, 633; *United States* v. *Panzavecchia,* 5 Cir. 1971, 446 F.2d 1293, cert. denied 1971, 404 U.S. 966, 92 S.Ct. 343, 30 L.Ed.2d 286. The rationale for this rule has been stated by the Supreme Court as:

> Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interest.

United States v. *Tateo,* 1964, 377 U.S. 463, 466, 84 S.Ct. 1587, 1589, 12 L.Ed.2d 448, 451; *See also United States* v. *Ewell,* supra, 383 U.S. at 121, 86 S.Ct. at 777, 15 L.Ed.2d at 631.

[2] Ragano insists nevertheless that the doctrine of collateral estoppel bars the government from adopting for purposes of retrial, following prior conviction, a different theory of the case than that relied upon at the original trial. *Ashe* v. *Swenson,* 1970, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469, is the asserted authority for this contention. The Supreme Court held in *Ashe* that the doctrine of collateral estoppel was intertwined with the constitutional guarantee against double jeopardy. That case denied the right to try Ashe for armed robbery in one of six participants in a poker game following his acquittal at an earlier trial for robbing another participant in the same game. The Supreme Court found that the only rationally conceivable issue before the jury in the earlier trial was whether the defendant had been one of the robbers, and the jury verdict in that trial showed that he had not. Thus, in the second trial the same issue was before a second jury with the identity of the victim the only change. The Court said the second trial was precluded by the not guilty verdict on the earlier charge, and that collateral estoppel prohibited the relitigation of facts previously determined in the defendant's favor. The Court stated that the doctrine of collateral estoppel was:

> simply that when an issue of *ultimate fact* has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.

Id. at 443, 90 S.Ct. at 1194, 25 L.Ed.2d at 475 (emphasis added).

[3] The doctrine of collateral estoppel as delineated in *Ashe* thus deals with facts not theories. See *United States* v. *Kehoe,* 5 Cir. 1975, 516 F.2d 78, 84 at n. 8. *United States* v. *Smith,* 5 Cir. 1973, 470 F.2d 1299. Nonetheless the appellant stresses language in *Ashe* condemning the prosecution in that case for using the first trial as "a dry run for the second prosecution." *Id.* at 447, 90 S.Ct. at 1196, 25 L.Ed.2d at 477. We hold that *Ashe* has no applicability in the circumstances of this case to the retrial of the charges in Count 3 in the original indictment following the reversal of the prior conviction on that count. What and all that the decision in *Ashe* condemned was the government's retrial of ultimate facts which had previously been decided in a defendant's favor. The case decided nothing respecting the government's right to alter its theory of the evidence in a case at a retrial following reversal of a prior conviction for the same offense. So restricting the prosecution from proceeding upon a new legal theory at retrial would erode severely the goals served by permitting retrial of a criminal defendant after the reversal of a conviction. The argument fails.

[4] The second theory Ragano advances as to double jeopardy is that the government was barred by the prior

prosecution from indicting him in a subsequent indictment on charges *not contained in the original indictment.* Specifically, tax evasion and false swearing in his 1966 tax return (Counts 2 and 3), tax evasion in his 1968 tax return (Count 4), and conspiracy to defraud the government in the collection of revenue (Count 1). We need go no further than to consider this claim as it relates to the conspiracy count. The trial court imposed concurrent five year sentences under Counts 1, 2 and 4, and two concurrent three year sentences under Counts 3 and 5. Under the concurrent sentence doctrine if the conviction is sustained as to the conviction under Count 1 (one of the counts as to which concurrent sentences were imposed) it is unnecessary to determine the legality of the conviction under the remaining counts. *United States* v. *Stone,* 5 Cir. 1973, 472 F.2d 909; *United States* v. *Rector,* 5 Cir. 1973, 488 F.2d 1079; *United States* v. *Vigo,* 5 Cir. 1970, 435 F.2d 1347. Cf. *Benton* v. *Maryland,* 1969, 395 U.S. 784, 791, 89 S.Ct. 2061, 23 L.Ed.2d 707.

[5, 6] Preliminary to a discussion of Count 1 we emphasize the Supreme Court's observation that "[c]onspiracy is not the commission of the crime which it contemplates, and neither violates nor 'arises under' the statute whose violation is its object." *Braverman* v. *United States,* 1942, 317 U.S. 49, 54, 63 S.Ct. 99, 102, 87 L.Ed. 23, 28. See also *Callanan* v. *United States,* 1961, 364 U.S. 587, 593, 81 S.Ct. 321, 325, 5 L.Ed.2d 312, 317. We have consistently held that the commission of a substantive offense and entering a conspiracy to commit that offense are separate and distinct, and that ordinarily a person may be convicted of and sentenced for both. *United States* v. *Marshall,* 5 Cir. 1975, 513 F.2d 274; *United States* v. *Jasso,* 5 Cir. 1971, 442 F.2d 1054, 1056, cert. denied 1971, 404 U.S. 845, 92 S.Ct. 146, 30 L.Ed.2d 81. Accord, *United States* v. *Jackson,* 10 Cir. 1973, 482 F.2d 1167, cert. denied 1974, 414 U.S. 1159, 94 S.Ct. 918, 39 L.Ed.2d 111.

In *Jasso,* supra, the defendant was reindicted and convicted after an appeal on which the government confessed error at the original trial. In addition to the three substantive marijuana smuggling counts contained in the original indictment, the new indictment charged Jasso and others with conspiring, in violation of Title 26, U.S.C. § 176(a), to smuggle, transport and conceal marijuana. We rejected Jasso's argument that the double jeopardy clause barred inclusion of the conspiracy count in the new indictment, stating: "[t]he government could have charged conspiracy at any time within the statutory limitation period without regard to any existing indictment for the marijuana offenses. An indictment for a new and different crime is clearly not double jeopardy." 442 F.2d at 1056. To like effect in *Marshall,* supra, a defendant was indicted for conspiracy to possess cocaine with intent to distribute and to cause distribution. The indictment alleged 27 overt acts, seven involving the defendant. Three of the seven had served as the basis for three substantive counts of an earlier indictment to which the defendant had entered guilty pleas. On appeal from conviction of the conspiracy charge the defendant urged that the conspiracy indictment, in light of his guilty plea to the earlier charges, infringed his double jeopardy rights, and precluded any effective defense on his behalf. We rejected each of these arguments noting that the substantive offenses and the conspiracy offense were separate chargs requiring "distinct elements of proof."

Appellant, however, maintains that the "same transaction" definition of "same offense" in the double jeopardy clause, barred the government from indicting him on the conspiracy count since it was not contained in the original indictment. This argument stems from the view advanced by the concurring opinion in *Ashe* of Justice Brennan, joined by Justices Douglas and Marshall, that the double jeopardy clause requires the government to join in one trial all charges against a defendant that grow out of a

single criminal act, occurrence, episode, or transaction. *Ashe*, supra, 397 U.S. at 453-54, 90 S.Ct. at 1199-1202, 25 L.Ed.2d at 481.

The government responds that the "same transaction" test, as proposed by Justice Brennan, has no application to retrials following the reversal of a prior conviction, since its sole purpose is to restrict the use of multiple trials on closely related charges when the government's interest could be vindicated in a single trial. Hence the government maintains that in the case of retrials after reversal of a prior conviction the government may indict on additional charges since the number of trials has been limited to the fewest possible.

[7] We find it unnecessary to decide the applicability of the "same transaction" definition of "same offense" to this case. This circuit has previously declined to apply the "same transaction" definition on the ground that although entitled to some weight the views of only three Justices are not binding. *United States* v. *Marshall*, 5 Cir. 1875, 513 F.2d 274; *United States* v. *Smith*, 5 Cir. 1973, 470 F.2d 1229; *Wingate* v. *Wainwright*, 5 Cir. 1972, 464 F.2d 209. Accord *Brown* v. *Hendrick*, 3 Cir. 1970, 431 F.2d 436, 440, cert. denied 1971, 402 U.S. 976, 91 S.Ct. 1677, 29 L.Ed.2d 141; *Moton* v. *Swenson*, 8 Cir. 1973, 488 F.2d 1060; *United States* v. *Fusco*, 7 Cir. 1970, 427 F.2d 361.

Evidentiary Rulings

Appellant next challenges his conviction on the grounds that the trial court erred in receiving in evidence certain corporate documents and tax returns, and in excluding from evidence the contents of a letter from the accountant of Two Seasons to the appellant's accountant. We deal first with the admissibility of the documents allowed in.

[8] As part of the government's case it argued that appellant was never in fact a bona fide shareholder or

officer of Two Seasons, and, therefore, the transfer of the stock to him and its subsequent sale was merely an attempt to disguise the payment of his finder's fee. The government sought to show this proposition through certain corporate reports filed with various departments of the State of Florida, which purported to list all of the directors, officers, and, in one instance, the shareholders of Two Seasons during the period in which appellant purportedly owned the stock. In none of these documents does appellant's name appear in any capacity. The documents involved consist of: (i) an annual corporate report, filed in July 1967, (ii) a certificate of amendment to the articles of incorporation, filed in November 1967, (iii) an application for a beverage license, filed in January 1968. These documents were offered by the prosecution as public records of the State of Florida, and appellant stipulated as to their genuineness, authenticity, and official character. However, when the government sought to have these documents entered into evidence, appellant objected on the ground that these were hearsay statements of Rizzo, as President of Two Seasons, regarding the status of appellant in the corporation and therefore inadmissible.[10] Fur-

[10] In *Ragano I*, supra, we held that the trial court erred in admitting into evidence the testimony of an IRS agent relating to an alleged admission by appellant regarding Rizzo's testimony before a state legislative committee. Rizzo had testified that appellant had earned the stock as a finder's fee and attorney's fee, and had not actually purchased the stock. When the IRS agent questioned appellant as to the truthfulness of this statement, appellant admitted that he was aware of it but stated that its substance was untrue. At trial the agent's testimony relating to this exchange was admitted over objection as an admission by appellant. This court held that the receipt of the agent's testimony relating to Rizzo's testimony was hearsay, and, in light of appellant's clear denial of the truth of that testimony, appellant's Sixth Amendment right of confrontation had been denied. *United States* v. *Ragano*, 476 F.2d at 414-16. On the present appeal, Ragano maintains that the testimony of Rizzo is being indirectly admitted through the corporate documents here involved.

ther, appellant alleges that during the period when these documents were filed his relations with Rizzo were strained, and, therefore, Rizzo had a motive to falsify the documents.

In our judgment the documents in question satisfy the requirements of the Federal Business Records Act, Title 28, U.S.C., Section 1732(a), and thus qualify as an exception to the hearsay rule. Further, we hold that the admission of this documentary evidence was cumulative, and the error, if any, was harmless error, which did not prejudice appellant's rights. Rule 52(a), F.R.Crim.P.; *United States* v. *Quong*, 6 Cir. 1962, 303 F.2d 499.

[9-11] In *Sabatino* v. *Curtiss National Bank*, 5 Cir. 1969, 415 F.2d 632, Judge Thornberry extensively analyzed the purpose and effect of the Business Records Act, setting forth a three-pronged test for determining the admissibility of business records:

> (1) the records must be kept pursuant to some routine *procedure* designed to assure their accuracy,
>
> (2) they must be created for *motives* that would tend to assure accuracy (preparation for litigation, for example, is not such a motive), and
>
> (3) they must not themselves be mere cumulations of hearsay or uniformed opinion.

415 F.2d at 637 (emphasis in original). We find that all of the documents in dispute in this case satisfy these guidelines. The *Sabatino* requirement that the documents be prepared for "motives" to assure accuracy is fulfilled by the fact that each was required by the state to be filed as a condition of corporate existence, and the loss of corporate privileges could result from a failure to file or by filing intentionally false documents. Florida Stat. §§ 608.04, 608.041, 608.351. The failure by the government to lay a foundation, in the form of testimony by an employee of

Two Seasons as to the procedure used in preparing and filing these documents does not affect their admissibility, in light of the stiplation as to their authenticity and the fact that they were filed and prepared in the regular course of business. Cf. *Meister* v. *C. I. R.*, 3 Cir. 1974, 504 F.2d 505; *United States* v. *Henderson*, 8 Cir. 1971, 446 F.2d 960, 966-67; *Carroll* v. *United States*, 9 Cir. 1963, 326 F.2d 72. Appellant's testimony as to his strained relations with Rizzo affected only the weight to be accorded the documents, not their admissibility.[11] See *United States* v. *Re*, 2 Cir. 1964, 336 F.2d 306.

[12] Additionally, the records objected to were similar in form and tenor to a document designating a resident agent for Two Seasons, already in evidence without objection which failed to list Ragano as either officer or director. Finally, both an employee and an officer of Two Seasons testified that in the realm of their duties neither had any knowledge of appellant's having the authority of an officer or director of the corporation. We hold therefore that the documents were merely cumulative of other evidence before the jury. *United States* v. *Quong*, supra, 303 F.2d at 504.

[13] On similar grounds Ragano maintains that prejudicial error was committed by the admission into evidence of the corporate income tax returns of Two Seasons, for the periods ending in March 1967 and March 1968. At the first prosecution these tax returns were received in evidence, with no error being claimed in this respect on the prior appeal. However, this court saw fit "in the interest of trial economy", 476 F.2d at 418, to direct attention to

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[11] The Business Records Act, Title 28 U.S.C. § 1732(a) provides in part:

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> All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

Greenbaum v. *United States*, 9 Cir. 1935, 80 F.2 113, 125, regarding the admissibility of tax returns. In *Greenbaum* the Ninth Circuit held that income tax returns were hearsay when used against an individual other than the maker, unless some relationship between the tax return and the individual against whom they were sought to be used could be found. 80 F.2d at 125-26. Leaving to one side the questionable continuing vitality of *Greenbaum* as precedent, we note that in the present case the tax returns were admitted for the limited purpose of use by the government expert witness in arriving at the evaluation of Two Seasons stock. They were useful for this purpose because they contained detailed schedules of land sales made by the corporation. With other records and documents, also in evidence, these tax returns provided an accessible and convenient source of supporting data on which to arrive at a valuation of the Two Seasons shares. The trial court's admission of the corporate tax returns for this stated limited purpose was not error. This is underscored by Ragano's claim in his loan application to County National Bank that the twenty shares had a value of $2,288,000, as contrasted to government testimony fixing the value at $400,000 to $600,000. See Note 7, supra, and accompanying text. Clearly, this evidence did not projudice Ragano's case.

Ragano also contends that the trial court erred in excluding from evidence a letter from the accountant for Two Seasons to Ralph Andretta, appellant's accountant, setting forth the former's interpretation of the tax consequences of the stock transactions. At trial the government called Andretta, and questioned him regarding the sources of information he employed in determining appellant's tax liabilities for the years in question.[12] In responding to this

[12] In passing we note Andretta's testimony, not questioned by Ragano, that in 1965 or 1966 appellant questioned Andretta as to the potential tax consequences of his receiving stock in Two Seasons in lieu of his finder's fee. Andretta responded that appellant would still be liable for income taxes on the fair market value of the stock. Appellant then inquired as to the tax consequences of purchasing the stock, to which Andretta replied that any profit realized from the subsequent sale of the stock would be taxed at capital gains rates.

inquiry Andretta stated that he had relied on a yearly "recap of fees" which had been sent by Two Seasons' accountant, Nelson Whyte, to him. Appellant's counsel sought on cross-examination to question Andretta as to the extent of the reliance placed in Andretta and Whyte by Ragano in calculating his tax liabilities and treating the stock transaction as one producing long term capital gain. In this regard the trial judge permitted appellant's counsel to show Andretta the letter from Whyte, and to inquire as to whether he had relied on the contents of the letter in determining the manner in which to report the stock transaction. The trial judge refused however to permit the contents of the letter to be published through Andretta, since it embodied also the opinion of another accountant not a witness, hence not available for examination as to his rationale in reaching that opinion. Appellant's counsel thereupon stated that he did not at this time intend to publish the letter, and that he would be satisfied if Andretta was permitted to identify it and state that he had relied on it.[13] This was permitted by the court. At the

[13] The following exchange occurred out of the presence of the jury:

> The Court: . . . You can ask him [Andretta] if this is the letter he relied on.
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> Mr. Rosen [Appellant's Counsel]: That is precisely what I wanted to do, Your Honor.
>
> The Court: But don't go into the details.
>
> Mr. Rosen: Well, I don't intend to publish it at this point, Your Honor, because I can't offer it out of turn.
>
> The Court: Well, you can't offer it until it is in evidence—you can't publish it until it is in evidence.
>
> Mr. Rosen: That's right.
>
> The Court: All right. Thank you. That is the main reason you are not going to do it.

close of the evidence the trial judge called attention to the fact that appellant's counsel had failed to publish the letter, and had not called Whyte as his witness. Appellant's counsel declined at that time to call Whyte as a witness or to offer the letter for publication.[14]

[14] Ragano urges that the trial court erred in not permitting Andretta to testify regarding the contents of the Whyte letter. We disagree. Appellant's counsel was permitted on cross-examination of Andretta to use the letter

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[14] The following occurred at that time at side bar, out of the jury's hearing:

The Court: To save possible trouble later on—you may have overlooked it—I don't believe that letter from Mr. Whyte to Mr. Andretta was ever received in evidence.

Mr. Tison [The Government's Prosecutor]: No, it wasn't.

Mr. Rosen: It wasn't.

Mr. Tison: That's correct.

Mr. Rosen: I think my position is preserved on the Government's side of the case.

Mr. Tison: Well, he could have brought the man who wrote it.

The Court: I just want——

Mr. Rosen: I am aware of it.

The Court: You had Mr. Whyte under subpoena.

Mr. Rosen: No, I didn't. The government did.

Mr. Tison: We had him under subpoena.

The Court: Can you make him available?

Mr. Tison: Certainly. I told Mr. Rosen——

The Court: He is available?

My ruling was that if Mr. Whyte was available I sustained the Government's objection to its introduction. And I did it on the ground that it should not be received because it does contain an opinion; and it apparently is an opinion which —well, at any rate, it contains an opinion. And where that witness is available he should be called, so that he could be cross-examined about that opinion.

And to put the letter in without that would, in effect, deny the Government the right to confront the witness; and it is hearsay.

Mr. Rosen: Well, I stated my position in the Government's case in chief. I do not propose to call Mr. Whyte.

to the full extent he requested. Subsequently he declined to call Whyte as a witness to be examined as to the letter in the face of the court's reminder of the state of record. Error is not demonstrated with respect to this incident.

Sufficiency of the Evidence

Lastly we find without merit Ragano's final ground for appeal, that error was committed by the trial court in the denial of his motion for a directed judgment of acquittal, first made when the government rested its case in chief and renewed when both sides announced closed. This contention ties back into the primary point discussed, *supra*, the asserted presence of double jeopardy as a result of the superseding indictment and of the shift in the government's theory of the case between trials. Indeed, it amounts when scrutinized to no more than a corollary to the same contention of "estoppel by argument".

It is urged that because the government's theory in *Ragano I* was that although the defendant acquired the Two Seasons stock in a valid transaction, he treated the tax consequences incorrectly, whereas at the second trial the government traveled on the new indictment on the different and inconsistent theory that the stock transactions were a sham masking the payment of a finder's fee, and hence that the government has placed itself in the position of urging at different times that the same underlying facts support inconsistent and irreconcilable interpretations. This, it is asserted, puts an end to any claim that guilt was established under assertedly accepted standards governing the proof required to establish guilt in circumstantial evidence cases. Reliance is placed upon Fifth Circuit cases, mostly pre-*Holland*,[15] stating that evidence

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[15] *Holland* v. *United States*, 1954, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150. *Holland* held that it is "confusing and incorrect" to instruct the jury that a special rule applies to cases based upon

sufficient to establish guilt in circumstantial evidence cases must not only be consistent with guilt, but inconsistent with innocence. The argument continues that if the evidence is equally consistent with diametrically different guilty theories, it must also be consistent with innocence, or at least is not inconsistent with innocence.

This argument fails in at least two particulars. First, the government's case is based to a slight extent only upon circumstantial evidence. *Inter alia,* the evidence at the second trial consisted of three separate sworn statements of Ragano that the stock transfers represented in some manner his 5% finder's fee for obtaining the $5,000,000 loan. Direct evidence, consisting of actual checks, wire transfers, and the like, traced the receipt of $250,000, 5% of $5,000,- to Ragano. The sole aspect of the government's proof resting on circumstantial evidence was the proposition that it was money, paid in 1966 and 1968, rather than the stock certificate received in 1967, that constituted the actual fee.

[15, 16] Second, assuming contrary to our post-*Holland* decisions [16] that the standard described is appropriate to

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circumstantial evidence, *ibid.* at 139-140, 75 S.Ct. at 137, 99 L.Ed. at 166, continuing: "Circumstantial evidence in this respect is intrinsically no different from testimonial evidence. Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more." *Ibid.* at 139-140, 75 S.Ct. at 137-138, 99 L.Ed. at 166-167.

[16] Post-*Holland,* the standard for review adopted by this Circuit, to be applied irrespective of whether the evidence is direct or circumstantial, is whether "reasonable minds could conclude that the evidence is inconsistent with the hypothesis of the accused's innocence". *United States* v. *Warner,* 5 Cir. 1971, 441 F.2d 821, 825,

this appeal, the hypothesis of the 1967 income is *not a hypothesis of innocence* as to this indictment. If credit, the hypothesis is one of guilt as to at least Count 5 of the superseding indictment. Under that theory the reporting of the stock transfers in the 1968 return is as completely false as under the view that the money was the finder's fee, though for different reasons. The hypothesis may well also support the finding of guilt as to Count 1, although in view of the concurrent sentence doctrine we will not lengthen this opinion further by a detailed analysis.

Further, the argument advanced entirely ignores the difference in the government's proof at the two trials. At the second trial some forty additional documents and the testimony of two witnesses demonstrated that at all relevant times a 40% interest in Two Seasons, Inc. was so valuable that it would be unreasonable to suppose that Ragano received a bona fide ownership interest in the stock as payment of the balance due on his finder's fee. Ragano's knowledge of the value of the stock was separately proved by some of his earlier statements and other evidence. In January 1967, when the shares were issued to him, they had a minimum value of at least $400,000, nearly three times the remaining unpaid amount due on his fee. The evidence produced at trial was supportive of a single conclusion only: that the series of stock transfers was no more than a sham designed to create a vehicle to disguise the fee as a capital gain.

The judgment appealed from is
Affirmed.

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cert. denied 1971, 404 U.S. 829, 92 S.Ct. 65, 30 L.Ed.2d 58. See further *e.g. United States* v. *Black,* 5 Cir. 1974, 497 F.2d 1039, 1041; *United States* v. *Amato,* 5 Cir. 1974, 495 F.2d 545; *United States* v. *Edwards,* 5 Cir. 1974, 488 F.2d 1154; *United States* v. *Fontenot,* 5 Cir. 1973, 483 F.2d 315, 321.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1974

No. 74-2376

D. C. Docket No. 73-132-CR-T-K

UNITED STATES OF AMERICA, *Plaintiff-Appellee*

versus

FRANK RAGANO, *Defendant-Appellant.*

Appeal from the United States District Court for the Middle District of Florida

Before WISDOM, SIMPSON and RONEY, *Circuit Judges*

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

October 14, 1975

Issued as Mandate:

APPENDIX D

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

January 20, 1976

TO ALL COUNSEL OF RECORD

No. 74-2376—USA v. Frank Ragano

Dear Counsel:

This is to advise that an order has this day been entered denying the petition(s) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, *Clerk*

/s/ by SUSAN M. GRAVORS
Deputy Clerk

/smg

cc: Mr. E. David Rosen
Mr. Michael Kinney
Mr. Thomas T. Steele
Mr. Claude Tison, Jr.

Supreme Court, U. S.
FILED
MAY 11 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1201

FRANK RAGANO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MIAMI REVIEW — 371-4853 — 377-3721

in the

Supreme Court

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OCTOBER TERM, 1975

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FRANK RAGANO,

Petitioner,

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UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The purpose of this Supplement to the Petition For A Writ Of Certiorari is to bring to this Court's attention the recent decision of *United States vs. Johnson*, United States Court of Appeals for the Fourth Circuit, Slip Opinion #75-1374, decided March 31, 1976.[1] The Supplement refers to that portion of the Petition For A Writ Of Certiorari contained in pages 26 and 27 thereof.

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[1]Since this decision is not yet reported, it is reproduced as Appendix A herein as a convenience to the Court.

In substance, *Johnson* held that a defendant may not be "prosecuted for charges more serious than those in his original indictment" after a successful appeal.

This petitioner had successfully appealed a conviction for violation of Title 26 United States Code §7206(1). In his 1968 income tax return, he reported the sale of stock for the sum of $230,022.20 with a cost basis of $50,000.00. This resulted in a long term capital gain in the amount of $180,022.20 upon which he paid the income tax. The government's original charge was that the petitioner had falsely *understated* his cost basis which should have been $230,022.20 with no gain or loss on the sale.

Upon remand, the prosecutor realized that in the posture of the remaining single count,[2] the evidence would establish that the petitioner had substantially overpaid his income taxes for the year 1968. Recognizing that such presents very little jury appeal and little chance of success, the United States Attorney reverted to a theory of prosecution that had been initially recommended by the Internal Revenue Service.

A five-count superseding indictment was returned charging the petitioner with one count of conspiracy, Title 18 United States Code §371, two counts of tax evasion, Title 26 United States Code §7201, and two counts of filing an income tax return containing false statements, Title 26 United States Code §7206(1), all of which was based upon the identical transaction and the same evidence presented in the first trial, and all of which was known to the Internal Revenue Service and the prosecutor when the first indictment was filed.

[2]The main thrust of the government's original case was directed at Counts One and Two, which resulted in not guilty verdicts.

This is precisely what *Johnson* held to be a denial of due process and that which the petitioner claims to be a denial of his rights.

In *Johnson*, since Count One of the original indictment was "identical" to one count in the second indictment, the Court affirmed the conviction on that count.

It is not unlikely that the government will urge that since Count Five of the new indictment was brought under the same statute and for the same year, that the *Johnson* decision is inapplicable. Count Five of the superseding indictment contained a charge entirely different from the remanded count; albeit under the same statute and for the same year. Instead of defending against a claim that he made a false statement in his income tax return resulting in a *substantial overpayment of taxes*, the petitioner was required by the new indictment to defend against the charge that he had made a different false statement resulting in a *substantial understatement of income*. Clearly, although the statute was the same, the charge itself not only was not "identical", but was considerably more serious.

What is not discussed in *Johnson* and should be considered is the pernicious effect of requiring a defendant to spread his defense over five counts instead of one, particularly when one of the new counts charges a conspiracy.

The effect of "upping the ante" was to penalize the petitioner for having successfully appealed the original count, which is exactly what the *Johnson* decision holds is not permissible under the due process clause.

CONCLUSION

It now appears that there is a clear conflict between the Courts of Appeals for the Fourth and Fifth Circuits, and for this reason the Petition For A Writ Of Certiorari should be granted.

Respectfully Submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 75-1374

UNITED STATES OF AMERICA,
Appellee,

-v-

HENRY JAMES JOHNSON, JR.,
Appellant.

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston.
K. K. Hall, District Judge.

Argued January 5, 1976. Decided Mar. 31, 1976.

Before WINTER, CRAVEN, and BUTZNER, Circuit Judges.

BUTZNER, Circuit Judge:

This appeal presents the question whether, after a guilty plea has been vacated on appeal, a defendant may be prosecuted for charges more serious than those in his original indictment when the prosecutor was aware of the new charges at the time of the plea. We hold that trial on the new charges denies the defendant due process of law.

I

Henry James Johnson, Jr., was indicted on November 3, 1972. He was charged in count one with conspiracy to distribute heroin from June 1, 1970, to the date of indictment. Counts two and three charged Johnson with substantive violations of the Travel Act, and count four charged that the acts alleged in count one were part of a continuing criminal enterprise.[1] Johnson pleaded not guilty, and his trial was set for January 3, 1973. On that date, however, he pleaded guilty to counts one and four of the indictment, and the government dismissed counts two and three. He was sentenced on count one to 15 years' imprisonment with a three-year special parole term pursuant to 21 U.S.C. §841(b)(1)(A) and fined $25,000. On count four he was given an 18-year concurrent sentence without parole and fined $100,000. Eighteen months later, we vacated this judgment for lack of compliance with Rule 11 and remanded the case for rearraignment. Johnson v. United States, No. 73-2458 (4th Cir. Sept. 3, 1974).

Rather than proceed to trial on the original charges, the United States obtained a superseding indictment charging Johnson with forty-one counts of violating federal narcotics laws. Counts one, two, and three were identical to the first three counts of the 1972 indictment, and count forty-one was the same as count four of the first indictment. The remaining thirty-seven counts charged Johnson with distributing heroin and violating the Travel Act. Johnson moved to dismiss the indictment on the ground

[1]Johnson was charged with violating 18 U.S.C. § 1952 and 21 U.S.C. §§ 812, 841(a), 846, and 848.

that the addition of the new counts violated due process and placed him in double jeopardy. The court denied his motion. The government then elected to try him on eight counts. Of these, only count one was identical to a count in the original indictment. A jury found Johnson guilty on seven counts. On count one, the court imposed the same punishment Johnson had received when he pleaded guilty, again sentencing him to 15 years in prison with a three-year special parole term and fining him $25,000. The punishment on the remaining six counts together with that on count one totaled 45 years' imprisonment with a 24-year special parole term and a $200,000 fine. We affirm his conviction under count one, reverse the remaining convictions, and remand for trial on counts two, three, and four of the original indictment.

II

In North Carolina v. Pearce, 395 U.S. 711 (1969), the Supreme Court held that the due process clause protects a defendant from both actual vindictiveness and the fear of retaliation for exercising his right to appeal. To implement this protection, the Court sharply restricted trial judges from imposing more severe sentences on retrial after a defendant's successful appeal. The Pearce principle was extended to the prosecutor in Blackledge v. Perry, 417 U.S. 21 (1971). There, after Perry requested a de novo trial in a court of record following a misdemeanor conviction in a magistrate's court, the prosecutor obtained a felony indictment against him based on the same conduct that was the subject of the misdemeanor charge. Noting that prosecutors have a strong interest in

discouraging new trials, the Court observed that "if the prosecutor has the means readily at hand to discourage such appeals—by 'upping the ante' . . . the State can insure that only the most hardy defendants will brave the hazards of a de novo trial." It therefore held "that it was not constitutionally permissible for the State to respond to Perry's invocation of his statutory right to appeal by bringing a more serious charge against him prior to the trial de novo." 417 U.S. at 27-29.

Blackledge has been applied to facts that differ only superficially from those in the case before us. In United States v. Jamison, 505 F.2d 407 (D.C. Cir. 1974), the court held that, after a mistrial on an indictment charging second degree murder, reindictment of the accused for first degree murder violated the due process clause, absent any justification for the second indictment. Even closer to the situation before us is Sefcheck v. Brewer, 301 F.Supp. 793 (S.D. Iowa 1969). There, applying Pearce, the court reversed a conviction on a more serious charge that was filed after the defendant had successfully challenged his guilty plea to the original charge, for which he had received less punishment.

The government argues that Blackledge and Jamison are distinguishable because in each the prosecutor knew of the offense charged in the second indictment at the time the original charge was made. Here, in contrast, the United States Attorney avers that he did not know of the crimes charged in the second indictment when the first

indictment was returned. The government relies on statements in Blackledge[2] and Jamison[3] which indicate there would have been no denial of due process if the government had shown it was unaware of the facts essential to the second indictments when the first ones were returned.

We believe, however, that Blackledge does not limit the application of the due process clause to the narrow bounds suggested by the government. The reference to the return of the indictment as the time for assessing the prosecutor's knowledge does not imply that some other date might not be equally critical, and the opinion does not attempt to catalog all tactics that may engender apprehension of prosecutorial vindictiveness. Rather, Blackledge unequivocally assures a prisoner of his right to appeal without fear that the prosecutor will retaliate with a more serious charge if the original conviction is reversed. Therefore, instead of simply assessing the prosecutor's knowledge at the time the original indictment was returned, as the government suggests, we must examine all circumstances of Johnson's situation.

---

[2]Blackledge v. Perry, 417 U.S. 21, 29 n.7 (1974):

"This would clearly be a different case if the State had shown that it was impossible to proceed on the more serious charge at the outset, as in Diaz v. United States, 223 U.S. 442. In that case the defendant was originally tried and convicted for assault and battery. Subsequent to the original trial, the assault victim died, and the defendant was then tried and convicted for homicide. Obviously, it would not have been possible for the authorities in Diaz to have originally proceeded against the defendant on the more serious charge, since the crime of homicide was not complete until after the victim's death."

[3]United States v. Jamison, 505 F.2d 407, 417 (D.C. Cir. 1974): "[A] charge increase might in some circumstances be justified by intervening events or by new evidence of which the government was excusably unaware at the time of the first indictment."

Presumably, the government was ready to go to trial on the original indictment as scheduled on January 3, for there is nothing in the record to indicate that it sought a continuance or was entitled to one. The prosecutor concedes that he knew all of the facts essential for the new indictment before Johnson changed his plea. Moreover, he stated that he did not then seek a superseding indictment because "[he] felt that the ends of justice had been met and no further prosecution was warranted based on the plea bargain." Only after Johnson successfully challenged the legality of the proceeding in which he pleaded guilty did the government seek a second indictment containing thirty-seven more charges. During the year and a half that elapsed between the entry of Johnson's plea and the new indictment following reversal of his conviction, the government discovered no new evidence to justify the additional charges.

The record, nevertheless, does not support a conclusion that the prosecutor maliciously sought the second indictment, and we accept his explanation that he obtained it simply to create a stronger case for the government. Blackledge points out, however, that the accused need not prove he was an actual victim of retaliation. Quoting from Pearce, the Court reiterated that " 'since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation . . .' " on the part of the prosecutor. 417 U.S. at 28. We conclude, therefore, that Johnson's case falls within the rationale of Pearce and Blackledge. After he successfully

challenged his conviction on the first indictment, his prosecution on the increased charges of the superseding indictment denied him due process of law.

Accordingly, except for count one, the judgment is vacated and the case is remanded. Johnson's conviction on count one of the second indictment is affirmed because it is identical to count one of the first indictment and the court imposed the same punishment.[4]

III

The next question is whether on remand Johnson may be tried only on the fourth count, to which he previously pleaded guilty, or whether he may also be tried on the second and third counts, which the government dismissed after his plea. This issue involves consideration of two constitutional concepts: double jeopardy and due process.

The hallmarks of jeopardy are not present. A jury was not impaneled to try Johnson on counts two and three, nor did the court receive evidence concerning his guilt on these counts. Cf. Serfass v. United States, 420 U.S. 377, 388 (1975). A different conclusion is not required by Green v. United States, 355 U.S. 184 (1957). There, the Court held that the double jeopardy clause precludes a prisoner's retrial for a greater offense after reversal of his conviction of a lesser included offense. The

[4]In a pro se submission, Johnson contends that his 1975 sentence for count one exceeded his 1973 sentence in violation of the due process clause as applied in North Carolina v. Pearce, 395 U.S. 711 (1969), because a three-year special parole term was added to the 1975 sentence. The district court committed no error in this respect. The record shows that the special parole term was also imposed after Johnson's guilty plea.

jury's verdict, the Court ruled, implicitly acquitted him of the greater offense. Green's bar has been applied to the trial of a greater offense after a defendant's guilty plea to the lesser included offense has been vacated. Rivers v. Lucas, 477 F.2d 199 (6th Cir. 1973); contra, United States v. Anderson, 514 F.2d 583 (7th Cir. 1975). Green and Rivers, however, are not controlling here. Counts one (conspiracy) and four (continuing illegal enterprise), to which Johnson pleaded guilty, are not lesser included offenses of the substantive counts two and three (Travel Act violations), which the government dismissed. It is this fact that distinguishes Green and Rivers. "[T]he commission of a substantive offense and a conspiracy to commit it are separate and distinct crimes, and a plea of double jeopardy is no defense to a conviction for both." Pereira v. United States, 347 U.S. 1, 11 (1954). Thus, there is no reason to conclude that the initial acceptance of Johnson's plea of guilty to counts one and four implicitly acquitted him of the separate and distinct substantive offenses charged in counts two and three. We conclude, therefore, that the double jeopardy clause does not protect Johnson from being tried on counts two and three.

If Johnson is convicted on counts two and three, there is a possibility that the punishment imposed on these counts will cause the total punishment after retrial to exceed that which was imposed on his plea of guilty to counts one and four.[5] This raises the question whether the possibility of such an increase offends the due process clause.

[5]Since Johnson's original sentence on count four was vacated when his guilty plea was set aside, North Carolina v. Pearce, 395 U.S. 711 (1969), will govern the sentence that can be imposed on retrial.

Not every increased sentence on retrial is unconstitutional. For example, in Chaffin v. Stynchcombe, 412 U.S. 17 (1973), the Court held that the imposition of a higher sentence on retrial by a jury that was ignorant of the first sentence did not violate the due process clause. The Court explained that sentencing by a second jury does not present the same opportunity for retaliation that may be present when the same judge imposes both the first and the second sentences. Similarly, the Court found the protection afforded by Pearce to be unnecessary at a trial de novo in a two-tiered court system because of the improbability of vindictiveness. Colten v. Kentucky, 407 U.S. 104, 112 (1972).

Read together, Pearce, Colten, Chaffin, and Blackledge teach that increased sentences on retrial do not in themselves violate the due process clause. The harm which the constitution prohibits is both the likelihood of vindictiveness and the apprehension of retaliation by either judge or prosecutor which may deter a defendant from appealing his conviction because his punishment may be enlarged on retrial. Blackledge, 417 U.S. at 27-28. Measured by these standards, Johnson's retrial on counts two, three, and four will not violate the due process clause, even though the inclusion of counts two and three subject him to the risk of greater punishment. Retrial on the original indictment would simply return Johnson and the government to the status that existed before Johnson pleaded guilty. Since the prosecution can only proceed on the charges that were brought before the plea, there is no opportunity for prosecutorial reprisal. United States v. Rines, 453 F.2d 878 (3d Cir. 1971); cf. United States v. Anderson, 514 F.2d 583 (7th Cir. 1975); United States ex rel. Williams v. McMann, 436 F.2d 103 (2d Cir. 1970).

IV

Johnson also complains of other errors. Consideration of most of them is made unnecessary by our disposition of the case or by their obvious lack of merit. Several, however, warrant brief discussion.

Count one charged a conspiracy beginning June 1, 1970, and continuing to November 3, 1972. Count forty-one of the second indictment charged a continuing criminal enterprise stemming from the count one conspiracy.[6] Since the Comprehensive Drug Abuse Prevention and Control Act of 1970, under which these charges were brought, did not take effect until May 1, 1971,[7] Johnson contends that these counts apply the law ex post facto.[8] Although the conspiracy and the continuing criminal enterprise were in operation before the effective date of the statutes, many of the overt acts occurred after May 1, 1971. When a statute takes effect after a conspiracy is formed, its application to the ongoing conspiracy does not violate the ex post facto prohibition of the constitution. United States v. Ferrara, 458 F.2d 868, 874 (2d Cir. 1972). Since a continuing criminal enterprise, as defined

[6]Count forty-one of the second indictment is identical to count four of the original indictment. Since Johnson's motions as to these counts present the same question and count four must be tried on remand, we will consider both motions together.

[7]Pub. L. No. 91-513, § 704(a) (Oct. 27, 1970).

[8]Johnson made similar motions concerning counts two and three. Since the district court did not rule on these motions and they are not properly on appeal, we decline to consider whether the conduct charged in those counts may be prosecuted under the Comprehensive Drug Act, particularly in light of the savings provision in Pub. L. No. 91-513, § 702 (Oct. 27, 1970).

in 21 U.S.C. § 848(b), is a type of conspiracy, the same rule applies. We conclude, therefore, that Johnson was not prosecuted under an ex post facto law.

Johnson moved for a change of venue, contending that pretrial publicity unfairly prejudiced him. The articles he cites demonstrate that pretrial publicity was not recent or widespread. Sporadic articles, appearing long before a trial, cannot be deemed to preclude a fair trial. See Wansley v. Slayton, 487 F.2d 90 (4th Cir. 1973). Moreover, the district judge carefully examined the jurors about their exposure to pretrial publicity and on each day of the trial questioned them about their exposure to reports of the trial. These examinations revealed no prejudice. In these circumstances, the denial of the motion for a change of venue was proper.

Johnson also moved to disqualify the trial judge, who previously had indicated he would have imposed a more severe sentence were it not for the plea bargain. The district judge's announced belief that distributing heroin deserved severe punishment did not disqualify him from conducting the retrial, and Johnson does not point to any unfairness or bias at trial. Cf. Jordan v. United States, 370 F.2d 126 (10th Cir. 1966). Thus, we find no error in the district judge's denial of this motion.

In summary, we affirm Johnson's conviction on count one of the second indictment because it is identical to count one of the first indictment, and the court did not increase his punishment. We vacate his conviction on the other counts of the second indictment. On remand, the second indictment, except for count one, should be dismissed. The first indictment should be reinstated, and

Johnson may be retried on counts two, three, and four of the first indictment. If he is convicted, the sentence on count four may not exceed the sentence imposed on this count when he pleaded guilty unless the conditions set forth in North Carolina v. Pearce, 395 U.S. 711 (1969), are met. If Johnson is convicted on counts two and three, neither the double jeopardy nor the due process clauses prohibit his total sentence on retrial from exceeding the total sentence imposed after he pleaded guilty.

Supreme Court, U. S.
FILED
JUN 11 1976
MICHAEL RODAK, JR., CLERK

No. 75-1201

In the Supreme Court of the United States

OCTOBER TERM, 1975

FRANK RAGANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1201

FRANK RAGANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals reversing petitioner's first judgment of conviction (Pet. App. A) is reported at 476 F. 2d 410. The opinion of the court of appeals affirming the second judgment of conviction (Pet. App. B) is reported at 520 F. 2d 1191.

JURISDICTION

The judgment of the court of appeals (Pet. App. C) was entered on October 14, 1975, and a petition for rehearing with a suggestion for rehearing *en banc* was denied on January 20, 1976 (Pet. App. D). The petition for a writ of certiorari was filed on February 20, 1976, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's conviction was barred by principles of *res judicata*, collateral estoppel or due process.

2. Whether the evidence was sufficient to sustain petitioner's conviction.

STATEMENT

1. On July 14, 1971, petitioner was indicted by a federal grand jury on three counts of income tax evasion and perjury. The first two counts of the indictment charged him with having attempted to evade, on the return filed by him in 1968, the tax due on a portion of the income he had received in 1967 (26 U.S.C. 7201) and with having made false statements on that return (26 U.S.C. 7206(1)). The third count charged him with having made false statements on the return filed by him in 1969, which covered taxable year 1968 (26 U.S.C. 7206(1)). The latter count charged, more specifically, that petitioner had declared falsely on the return filed by him in 1969 that he had sold for $230,022.20 certain shares of stock in Two Seasons, Inc., obtained by him in consideration of a $50,000 promissory note, and that the resulting income of $180,022.20 represented long-term capital gain. The jury acquitted petitioner of the charges contained in the first two counts of the indictment, relating to taxable year 1967, and convicted him on the third count, relating to taxable year 1968. The court of appeals reversed the conviction, however, because of evidentiary errors at the first trial (Pet. App. A).

Prior to the date of the scheduled retrial on Count III, a superseding six-count indictment was returned against petitioner and S. A. Rizzo. The superseding indictment charged that petitioner had conspired with Rizzo to defraud the United States of revenue by agreeing to disguise the payment of a "finder's fee" to petitioner as a stock transaction on which petitioner could claim a long-term

capital gain, in violation of 18 U.S.C. 371 (Count I). The indictment also charged that petitioner had attempted to evade, on the returns filed by him in 1967 and 1969, the tax due on portions of the income he had received in taxable years 1966 and 1968, and that he had made false statements on those returns, in violation of 26 U.S.C. 7201 and 7206(1) (Counts II-V). The sixth count of the superseding indictment charged that Rizzo had made false statements on the return filed by him in 1970 regarding the Two Seasons stock that he had delivered to petitioner, in violation of 26 U.S.C. 7206(1).[1]

Petitioner moved prior to trial to dismiss the superseding indictment on grounds of double jeopardy and collateral estoppel. The district court denied the motions, finding that the offenses charged in the superseding indictment were not identical to those charged in the first two counts of the original indictment and that no issue of ultimate fact raised by any count of the superseding indictment could be said to have been resolved in petitioner's favor at the first trial (Pet. App. B 25a). Following a jury trial, petitioner was convicted on all five counts of the superseding indictment in which he was named. He was sentenced to concurrent terms of five years' imprisonment on each of Counts I, II and IV (the conspiracy and tax evasion counts) and three years' imprisonment on Counts III and V (the false statement counts). The sentences were suspended, however, and petitioner was placed on probation for three years (Pet. App. B 25a-26a). The court of appeals affirmed (Pet. App. B).

2. The evidence at trial, as summarized by the court of appeals (Pet. App. B 26a-30a), showed that sometime in

---

[1]Rizzo's motion to sever the charges against him was granted prior to trial, and the charges were subsequently dismissed for reasons unrelated to the issues raised in the present petition (Pet. App. B 25a n. 3).

1964 or 1965 Rizzo sought petitioner's assistance in obtaining a $5,000,000 loan from the Pension Fund maintained by the International Brotherhood of Teamsters. Assistance of the type requested by Rizzo normally would have entitled petitioner to receive from the recipient of the loan a "finder's fee" equal to five percent of the loan proceeds. Petitioner agreed to assist Rizzo in obtaining the loan and did so in a variety of ways. The Pension Fund formally approved the loan on March 3, 1965.

Shortly before the loan was approved, Two Seasons, Inc., was incorporated under the laws of Florida for the purpose of acquiring, holding and developing real estate. The first meeting of the company was held on the same day the loan application was submitted to the Pension Fund. Rizzo was elected chairman of the board and president of Two Seasons at the meeting, and all 50 shares of the company's stock were issued jointly to Rizzo and his wife.

Two months after the Pension Fund approved the loan, petitioner received from Two Seasons a check for $15,000. The payment was reflected on the company's books as a charge against the "Acquisition Costs" account. Petitioner received a second payment in September 1965, in the amount of $10,000, which was charged on the company's books as a legal expense. From November 1965 through the end of 1967, petitioner received from Two Seasons additional payments in amounts ranging up to $30,000—all of which were recorded on the company's books as loans. But such "loans" were neither secured by promissory notes nor was interest provided for or paid on them. By the end of 1967, petitioner had received from Two Seasons "loans" totalling approximately $90,550—of which $30,000 was transferred during 1967 on the company's books to the "Legal Expense and Land Acquisition Costs" account, leaving a "loan" balance at the end of 1967 of $60,550.

Almost simultaneously with his receipt of payments from Two Seasons, petitioner began borrowing funds from the County National Bank of North Miami Beach, Florida, and the Central Bank of Tampa, Florida. By September 1967, the balance of petitioner's loan accounts at the Central Bank of Tampa was $43,000. During the same month, Rizzo instructed an employee of Two Seasons to obtain an additional $10,000 loan from the County National Bank, to be guaranteed by Rizzo, with the proceeds paid to petitioner.

On January 3, 1967, Rizzo transferred 20 shares of Two Seasons stock to petitioner in exchange for petitioner's execution of an unsecured, non-interest-bearing demand note in the amount of $50,000. Rizzo ultimately cancelled the note in 1968, although petitioner had not prior to that time made any payments on the note. Also on January 3, 1967, petitioner was elected vice-president of Two Seasons and was named to the company's three-member board of directors.

On March 24, 1967, petitioner retransferred to Rizzo the certificate representing the 20 shares of Two Seasons stock held by him. On November 6, 1967, two certificates—each representing ten shares of Two Seasons stock—were issued to petitioner. Just before retransferring the 20 shares of stock to Rizzo, petitioner applied to the County National Bank for a loan. He valued the 20 shares in that application at $2,288,000—but did not list either the $50,000 demand note held by the Rizzos or any of the "loans" made to him by Two Seasons among his liabilities.

In December 1967, petitioner delivered a certificate representing ten shares of Two Seasons stock—which had been reissued to him approximately one month earlier—to the County National Bank as security for his outstanding loans. At the same time, petitioner instructed the bank to deliver the stock certificate to the person designated

by him at the time the loans were repaid. By the end of 1967, petitioner had received from Two Seasons and from the two banks (in the form of loans) payments totalling about $250,000 (or five percent of the $5,000,000 originally loaned by the Pension Fund).

On January 2, 1968, petitioner and Rizzo executed a shareholders' agreement. The agreement provided that if either the Rizzos or petitioner pledged Two Seasons stock as security for loans, and those loans came into default, the remaining stockholder(s) would have the right to satisfy the obligations, redeem the stock pledged and exercise full rights of ownership over the stock so redeemed. By a handwritten codicil to this agreement, dated January 12, 1968, petitioner assigned his 20 shares of Two Seasons stock to Rizzo in consideration for Rizzo's "assuming the present indebtedness of [petitioner] to the Central * * * Bank of Tampa, Florida, and the County [National] Bank of North Miami Beach, Florida, and also holding [petitioner] harmless and no longer indebted to the said corporation [Two Seasons, Inc.] for loans made by the said corporation to [petitioner] (Pet. App. B 29a)." The codicil did not specifically mention the $50,000 promissory note petitioner had given Rizzo in January 1967, but that note apparently was covered by the codicil.

On April 18, 1968, Rizzo paid $68,000 to the County National Bank in full satisfaction of petitioner's outstanding loans there. He received in return the ten shares that petitioner had pledged as security for such loans. Petitioner retained the certificate representing the other ten shares of Two Seasons stock until August 1968, at which time he delivered the certificate to the Central Bank of Tampa with instructions to deliver it to the person who satisfied his obligations to that bank. Rizzo sent an employee of Two Seasons to the Central Bank on August 20, 1968, with a check for $51,108.12 to satisfy petitioner's

obligations there and to take possession of the stock certificate. The two ten-share certificates were subsequently cancelled, and a replacement certificate was issued to Rizzo. In September 1968, Rizzo personally assumed petitioner's indebtedness to Two Seasons, thereby relieving petitioner of any further obligation for the "loans" he had received from the company beginning in November 1965.

ARGUMENT

As noted above (see Jurisdiction, *supra,* p. 1), the present petition was not timely filed. The questions raised do not, in any event, merit further review.

1. Petitioner first contends (Pet. 13-16) that his acquittal on Count 1 of the original indictment, charging tax evasion for taxable year 1967, barred his subsequent prosecution for conspiracy, tax evasion and the making of false statements on his returns for taxable years 1966 and 1968. This contention is without merit.

(a) To the extent that petitioner is claiming that principles of *res judicata* embodied in the Double Jeopardy Clause preclude his conviction on the charges contained in the superseding indictment, following his acquittal on Count 1 of the original indictment, such claim depends upon his being able to show that the offenses charged in the superseding indictment are identical to or included within the offense charged in the original Count 1. *E.g., United States* v. *Ewell,* 383 U.S. 116, 124-125; *Green* v. *United States,* 355 U.S. 184. But petitioner properly concedes (Pet. 14) that in a prosecution for tax evasion, each taxable year represents a separate offense. It is similarly settled, as the court of appeals pointed out (Pet. App. B 34a), that "[c]onspiracy is not the commission of the crime which it contemplates, and neither violates nor 'arises under' the statute whose violation is its object" (quoting from *Braverman* v. *United States,* 317 U.S. 49, 54).

None of the offenses charged in the superseding indictment is identical to the offenses charged in Counts I and II of the original indictment, and principles of *res judicata* therefore did not bar petitioner's conviction for those offenses following his acquittal on the original Counts I and II—unless, of course, the prosecution of additional offenses was precluded by the "same transaction" test proposed by petitioner (but see discussion, *infra*, pp. 11-13). Indeed, in a prosecution for tax evasion during a particular year, the government must allege and prove that the defendant received income during that taxable year that he subsequently failed to report on his tax return for that year. Had the evidence at petitioner's first trial showed that the income referred to in the indictment was received by petitioner during taxable years 1966 and 1968—rather than during 1967, as charged—that variance would have been fatal to the charge in the original Count I, since it would have failed to establish that he had evaded taxes due for 1967. See, *e.g.*, *United States* v. *House*, 524 F. 2d 1035, 1039-1040 (C.A. 3). The jury was instructed in accordance with these basic principles at both trials (VI Tr. 23-24, 31; XI R. 1627-1628, 1637-1639).[2]

Petitioner's acquittal on the charges contained in Counts I and II of the original indictment thus represented exoneration only on the charge that he had attempted to evade the tax due on income received by him during taxable year 1967. Since petitioner was neither previously acquitted nor previously convicted of the charges contained in the indictment at the second trial, principles of *res judicata* did not bar his trial on those charges.[3]

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[2]"Tr." refers to the transcript of petitioner's second trial. "R." refers to the transcript of the first trial.

[3]The charge in Count V of the superseding indictment was identical to the charge in Count III of the original indictment, on which petitioner was convicted at his first trial. It is settled, of course, that

(b) Neither do principles of collateral estoppel bar petitioner's conviction on the charges contained in the superseding indictment. Whether a general jury verdict of acquittal provides a basis for overturning a subsequent conviction depends upon "'whether a rational jury could have grounded its [prior] verdict upon an issue other than that which the defendant seeks to foreclose from consideration'" (*Ashe* v. *Swenson*, 397 U.S. 436, 444 (footnote omitted)). The factual premise underlying petitioner's apparent contention that his conviction on the charges contained in the superseding indictment is barred by the doctrine of collateral estoppel is his assertion that he was acquitted at his first trial "of attempting *in any manner* to evade or defeat *any tax* due and owing on the alleged finder's fee" he received from Rizzo (Pet. 13; petitioner's emphasis).

An obvious, and insurmountable, defect in this assertion is that petitioner was convicted at his first trial of having falsely stated on his 1968 return that the proceeds of his sale of Two Seasons stock represented capital gain rather than ordinary income. It is impossible to square this finding with petitioner's characterization of the jury's general verdict on Counts I and II of the original indictment as a finding that he had not attempted "in any manner" to evade or defeat "any tax" due on the finder's fee paid to him by Rizzo.

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where, as here, a defendant succeeds in having his conviction overturned on appeal, he does not enjoy any protection against reprosecution on that charge. *E.g.*, *Forman* v. *United States*, 361 U.S. 416, 425; *United States* v. *Ball*, 163 U.S. 662, 672; see also *United States* v. *Dinitz*, No. 74-928, decided March 8, 1976 (slip op., pp. 9-10 and n. 13). Petitioner's suggestion that his conviction on Count V of the superseding indictment must nevertheless be reversed, because the government characterized the evidence on Count V differently than it originally characterized the evidence on Count III, is discussed, *infra*, pp. 10-11.

As already noted, moreover, the jury's responsibility with respect to the charges in Counts I and II of the original indictment was to determine whether petitioner had attempted to evade in connection with the return filed by him in 1968 the tax due on a portion of the income he received in 1967. Petitioner's acquittal on those charges did not, either expressly or by implication, involve or depend upon a finding that he had not attempted to evade payment of the tax due on income received by him during other taxable years. In fact, had the evidence at the first trial showed that petitioner received the unreported income referred to in Counts I and II of the original indictment during a year or years other than 1967, the jury was obligated to acquit him on those charges.

2. Petitioner also contends (Pet. 17-22) that by successfully appealing his conviction on Count III of the original indictment he "consented" to be retried only under the theory and "factual characterizations" that underlay that conviction. Petitioner bases this contention on *Green* v. *United States*, *supra*, and *Ashe* v. *Swenson*, *supra*. Neither case aids him.

The defendant in *Green* was originally tried on a two-count indictment charging him with arson and first degree murder. The jury found him guilty of arson and second degree murder. Green successfully appealed his conviction and on remand was tried again for first degree murder. Following his conviction on that charge, he again appealed. This Court ultimately reversed the conviction, holding that Green's conviction at his first trial of the lesser included offense of second degree murder, and the jury's silence concerning the charge of first degree murder, operated as an acquittal on the latter charge and, accordingly, that the Double Jeopardy Clause precluded his subsequent reprosecution for first degree murder. Thus, the decision in *Green* stands for the proposition that a

defendant's conviction on a lesser included offense precludes the defendant's reprosecution on the greater charge implicitly rejected by the jury at the earlier trial. Nothing in *Green* supports petitioner's contention that a defendant who succeeds in having his conviction overturned on appeal may be retried only under the theory and "factual characterizations" that underlay that conviction. Neither does *Green* preclude a defendant's conviction, following the reversal of an earlier conviction, on charges not at issue in the earlier trial—and with respect to which the defendant's guilt or innocence had not previously been resolved.

In *Ashe* v. *Swenson* this Court held that the doctrine of collateral estoppel precluded the State from trying the defendant on a charge of having robbed one of the participants in a poker game after he had been acquitted of having robbed another participant in the game at the same time. While *Ashe* has some relevance to petitioner's first contention, discussed above (pp. 9-10, *supra*), it does not aid him as to this point. As the court of appeals correctly pointed out (Pet. App. B 33a):

> *Ashe* has no applicability in the circumstances of this case to the retrial of the charges in Count 3 [of] the original indictment following the reversal of the prior conviction on that count. What and all that the decision in *Ashe* condemned was the government's retrial of ultimate facts which had previously been decided in a defendant's favor [in *Ashe*, that the defendant had not been one of the robbers]. The case decided nothing respecting the government's right to alter its theory of the evidence in a case at a retrial following reversal of a prior conviction for the same offense.

3. Petitioner next contends (Pet. 22-26) that the "same transaction" test for defining "offenses" under the Double

Jeopardy Clause precluded the government from obtaining, following his first trial, a superseding indictment containing charges in addition to those contained in the original indictment. Petitioner also claims that the "same transaction" test prevented the government from altering its "legal theories" or its characterization of relevant evidence following reversal of his conviction. Petitioner concedes (Pet. 26), however, that this Court has never held that the joinder of all offenses arising from the same transaction or series of related transactions is constitutionally required. Moreover, petitioner's assertion that the "same transaction" test barred any restructuring of his prosecution following the reversal of his earlier conviction represents no more than a restatement of the contention discussed immediately above. For the reasons already noted, the latter assertion is without merit.

In any event, the "same transaction" test—even if accepted by this Court—would not have prevented the government from prosecuting petitioner, following the reversal of his earlier conviction, on the charges contained in the superseding indictment. By its very nature, the "same transaction" test has nothing whatever to do with the permissibility of retrial on additional charges following the reversal of an earlier conviction. The purpose of the "same transaction" test, as discussed by individual members of this Court (*e.g.*, *Ashe* v. *Swenson*, *supra*, 397 U.S. at 453-454 (Brennan, J., concurring)), is to restrict the use of multiple trials on closely-related charges, when the affected governmental interests can be vindicated in a single trial. That purpose is not furthered by barring the return of additional charges following the reversal of an earlier conviction, since in such circumstances it is the reversal of the prior conviction—rather than the government's initial failure to join all related charges

in a single prosecution—that is the cause of the second or subsequent trial.[4]

4. Petitioner contends further (Pet. 26-27) that the Due Process Clause of the Fifth Amendment precluded his retrial on the charges contained in the superseding indictment because such charges represented an effort by the government to "up[ ] the ante" in a manner forbidden by *Blackledge* v. *Perry*, 417 U.S. 21. Petitioner did not raise this issue in the court of appeals, and he is therefore precluded from doing so here.[5] *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n. 2; *Lawn* v. *United States*, 355 U.S. 339, 362-363 n. 16. The contention is, in any event, without merit.

The respondent in *Blackledge* had been convicted in a county district court of a misdemeanor. He subsequently filed a notice of appeal in the county superior court, pursuant to a state statute permitting persons convicted in district court to obtain a trial *de novo* in superior court. Prior to respondent's appearance for trial in the superior court, however, the prosecutor substituted a felony charge for the original misdemeanor charge. This Court held

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[4]It is at least doubtful, moreover, whether the events put in issue by the superseding indictment were part of the "same transaction." If the "same transaction" test were held to cover events as diverse as those involved here (*e.g.*, a $30,000 payment in April 1966, a $51,000 payment in August 1968, plus additional loans and payments spread over a four-year period), the result would be to require the mandatory joinder of all offenses involving the same or similar parties with generally related purposes. While the latter characteristics support permissive joinder under Rule 8(a) of the Federal Rules of Criminal Procedure, the "same transaction" proposal "obviously contemplates several criminal charges arising from a single episode that is closely circumscribed in time and place" (*United States* v. *Gremillion*, 464 F. 2d 901, 906 (C.A. 5)).

[5]This Court issued its decision in *Blackledge* more than four months before petitioner filed his brief in the court of appeals.

that such substitution was contrary to the Due Process Clause of the Fourteenth Amendment, since there was a realistic possibility that the State was retaliating against respondent for exercising his statutory right to a trial *de novo*—that is, the opportunity to substitute the greater charge for the lesser "pose[d] a realistic likelihood of 'vindictiveness'" (417 U.S. at 27). But the record in the present case clearly shows that, in obtaining a superseding indictment against petitioner, the government was not motivated by vindictiveness. In fact, the government stipulated prior to petitioner's second trial that such trial would constitute a retrial for sentencing purposes, within the meaning of *North Carolina* v. *Pearce*, 395 U.S. 711, and, accordingly, that petitioner would not—if convicted—be sentenced to a term more severe than had been imposed under Count III of the original indictment (Pet. App. B 26a n. 5).[6]

5. Finally, petitioner contends (Pet. 27-28) that the inconsistency between the theory upon which the government based its prosecution at his first trial and the theory advanced at his second trial confirms that the underlying evidence supports two inconsistent and irreconcilable interpretations of the transactions in question, and that the trial court consequently erred in denying his motion for a directed judgment of acquittal. As an attack on the sufficiency of the evidence, this contention is amply refuted by the evidence at trial showing that petitioner and Rizzo engaged in an elaborate series of manipulations designed to conceal the fact that petitioner had received from Rizzo an unreported finder's fee of approximately five percent of the proceeds of the loan from the Teamsters' Pension Fund. Moreover, as the court of appeals concluded (Pet. App. B 43a):

> This contention ties back into the primary point discussed, *supra*, the asserted presence of double jeopardy as a result of the superseding indictment and of the shift in the government's theory of the case between trials. Indeed, it amounts when scrutinized to no more than a corollary to the same contention of 'estoppel by argument'.

[6]Following his original conviction, petitioner was sentenced to three years' imprisonment, with the first five months and 29 days of the three years to be served in a jail-type institution and the remaining time on probation. Petitioner has not contended, either here or in the court below, that the sentence imposed following his second trial, which is for a longer period but includes no imprisonment (see discussion, *supra*, p. 3), is more severe than the sentence imposed following the first trial.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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